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Ending the Internal Affairs Farce

RACHEL MORAN†

INTRODUCTION

Trust between law enforcement agencies and the people they protect and serve is essential in a democracy. It is key to the stability of our communities, the integrity of our criminal justice system, and the safe and effective delivery of policing services.[1]

I don't trust the police because I can't.[2]

On October 20, 2014, Chicago police officer Jason Van Dyke, a white man, shot and killed Laquan McDonald, a seventeen-year-old black teenager who had his back turned when Van Dyke fired the first of sixteen shots.[3] Van Dyke continued to shoot even after McDonald lay writhing—and dying—on the pavement.[4] Five fellow police officers who witnessed the shooting filed reports claiming that McDonald was aggressively moving toward the officers when Van Dyke shot him—claims that video footage from the incident

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1. PRESIDENT'S TASK FORCE ON 21ST CENTURY POLICING, FINAL REPORT 1 (2015), http://www.cops.usdoj.gov/pdf/taskforce/taskforce_finalreport.pdf.

2. Keith Reed, *I Don't Trust the Police Because I Can't*, EBONY (Sept. 18, 2013), http://www.ebony.com/news-views/i-dont-trust-the-police-because-i-cant-304#axzz3gXMPq6eE.

3. *See Warning, Graphic Content: Laquan McDonald Shooting Dash-cam Video*, CHI. TRIB. (Jan. 22, 2016), http://www.chicagotribune.com/news/local/breaking/ct-laquan-mcdonald-police-dashboard-short-video-premiumvideo.html; *see also* Timothy Williams, *Chicago Rarely Penalizes Officers for Complaints, Data Shows*, N.Y. TIMES (Nov. 18, 2015), http://www.nytimes.com/2015/11/19/us/few-complaints-against-chicago-police-result-in-discipline-data-shows.html?smid=tw-nytimes&smtyp=cur&_r=0.

4. *See* sources cited *supra* note 3.

contradicts.[5] The City of Chicago refused to release squad car footage of the shooting for more than a year after McDonald's death, until a Cook County court finally ordered it do so.[6] After the video was released and Van Dyke was charged with first degree murder, Chicago residents learned that Van Dyke had been named in eighteen prior civilian complaints for incidents ranging from excessive force to racial slurs, and not one of those prior complaints had ever been sustained.[7] Mayor Rahm Emanuel demanded the resignations of both the City's police commissioner and the head of the review board responsible for investigating police misconduct claims, and pledged to "dramatically improv[e] our system of police accountability."[8]

One month after Laquan McDonald's death, Timothy Loehmann, a white police officer in Cleveland, shot and killed Tamir Rice, a twelve-year-old African American boy who was playing in the park with a toy gun.[9] Loehmann, who killed Tamir just seconds after arriving at the park in response to a 911 call of a boy with a "probably fake" gun, had resigned from his previous job as a police officer after experiencing a

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5. Monica Davey, *Officers' Statements Differ from Video in Death of Laquan McDonald*, N.Y. TIMES (Dec. 5, 2015), http://www.nytimes.com/2015/12/06/us/officers-statements-differ-from-video-in-death-of-laquan-mcdonald.html?ribbon-ad-idx=4&rref=world&_r=0&module=ArrowsNav&contentCollection=U.S.&action=swipe&region=FixedRight&pgtype=article.

6. *See* Jason Meisner & Jeremy Gorner, *Chicago Forgoes Appeal After Judge Orders Release of Video of Fatal Police Shooting*, CHI. TRIB. (Nov. 20, 2015), http://www.chicagotribune.com/news/local/breaking/ct-judge-orders-release-of-video-showing-fatal-shooting-by-police-officer-20151119-story.html.

7. Williams, *supra* note 3.

8. Jon Seidel, *Police Review Authority Boss Ousted*, CHI. SUN TIMES (Dec. 6, 2015), http://chicago.suntimes.com/news/7/71/1158836/police-review-authority-boss-ousted; *accord* Mitch Smith, *Mayor of Chicago Announces Measures to Curb Use of Deadly Force by the Police*, N.Y. TIMES (Dec. 30, 2015), http://www.nytimes.com/2015/12/31/us/mayor-rahm-emanuel-announces-measures-to-curb-use-of-deadly-force-by-chicago-police.html?partner=rss&emc=rss&smid=tw-nytimes&smtyp=cur.

9. Timothy Williams & Mitch Smith, *Cleveland Officer Will Not Face Charges in Tamir Rice Shooting Death*, N.Y. TIMES (Dec. 28, 2015), http://www.nytimes.com/2015/12/29/us/tamir-rice-police-shootiing-cleveland.html?smid=tw-nytimes&smtyp=cur&_r=0.

"dangerous loss of composure" when handling firearms.[10] More than a year after Tamir's death, Cuyahoga County's chief prosecutor recommended that Loehmann not be indicted for killing Tamir,[11] but claimed that the lessons the city learned from the case would ensure that "Tamir will not have died in vain."[12] Cleveland's mayor told his constituents that city officials had done "a lot of soul searching" after Tamir's death, and promised that increasing accountability for police misconduct would be a priority for his administration.[13]

In April of 2015, North Charleston police officer Michael Slager shot and killed Walter Scott, an unarmed African American man, who was fleeing with his back to the officer when Slager fired eight shots at him from behind.[14] Slager, who is white, had been named in a prior complaint for using his taser on an African American man with no justification, slamming the man to the ground, and dragging him away.[15] Slager had also been cited in a separate incident for failing to file a police report on behalf of an African American woman who complained that her children were being harassed.[16] An internal investigation into the excessive force claim cleared Slager within weeks without ever contacting the complainant

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10. *Id.*

11. *Id.*

12. *Prosecutor McGinty Responds to NAACP Request for Tamir Rice Grand Jury Documents*, WKYC (Jan. 6, 2016), http://www.wkyc.com/story/news/local/cleveland/tamir-rice-shooting/2016/01/06/naacp-asks-grand-jury-documents-tamir-rice-case/78373754.

13. Williams & Smith, *supra* note 9; *Cleveland Mayor Frank Jackson on Accountability, Police Reform and His Vision for the Future of Policing*, NEWSONE (Mar. 2015), http://newsone.com/3096051/cleveland-mayor-frank-jackson-on-accountability-police-reform-and-his-vision-for-the-future-of-policing-video.

14. Ashley Fantz & Holly Yan, *Dash Cam Video Shows the Moments Before South Carolina Police Shooting*, CNN (Apr. 9, 2015), http://www.cnn.com/2015/04/09/us/south-carolina-police-shooting.

15. Ray Sanchez, *Officer Michael Thomas Slager of South Carolina: What We Know about Him*, CNN (Apr. 9, 2015), http://www.cnn.com/2015/04/08/us/south-carolina-michael-slager.

16. *Id.*

to obtain his side of the story.[17] In the wake of national outrage over Scott's death, North Charleston's mayor pledged an independent investigation into the shooting, and promised to order body cameras for the police force in order to improve officer accountability.[18]

Police officers across the United States killed 2318 people between January 1, 2014 and December 31, 2015.[19] Several of those victims—McDonald, Rice, Scott, Michael Brown, Eric Garner, Akai Gurley, Freddie Gray, and Samuel DuBose, to name just a few of the unarmed black men killed by police—have in their deaths become the focal points of further public outrage, protests, and rioting.[20] In the wake of these tragic

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17. Associated Press, *Cop Who Shot Black Man in Back Had Earlier Excessive-Force Complaint*, N.Y. POST (Apr. 9, 2015), http://www.nypost.com/2018/04/09/cop-who-shot-black-man-had-prior-excessive-force-complaint-report/.

18. *See* Wesley Lowery & Mark Berman, *In North Charleston, Urgent Promises of Change to Avoid 'Another Ferguson,'* WASH. POST (Apr. 8, 2015), https://www.washingtonpost.com/politics/in-north-charleston-urgent-promises-of-change-to-avoid-another-ferguson/2015/04/08/659b16c2-de25-11e4-be40-566e2653afe5_story.html.

19. *See* KILLED BY POLICE, http://killedbypolice.net/ (last visited May 30, 2016). Because police departments are generally not required to report how many people they have killed, and are often resistant to doing so, no precise governmental statistics are available regarding these numbers. A group of Harvard Medical Scientists recently called on U.S. public health agencies to make police killings a "notifiable condition," which would require police departments to report each killing to their corresponding Public Health Department. *See* Dylan Sevett, *Harvard Medical Scientists Say Police Killings Should Be Recorded as Public Epidemic*, U.S. UNCUT (Dec. 27, 2015), http://usuncut.com/black-lives-matter/harvard-medical-police-killings-public-epidemic/.

20. *See, e.g.*, Al Baker et al., *Beyond the Chokehold: The Path to Eric Garner's Death*, N.Y. TIMES (June 13, 2015), http://www.nytimes.com/2015/06/14/nyregion/eric-garner-police-chokehold-staten-island.html; J. David Goodman & Vivian Yee, *Officer Charged in Akai Gurley Case Debated Reporting Gunshot, Officials Say*, N.Y. TIMES (Feb. 11, 2015), http://www.nytimes.com/2015/02/12/nyregion/akai-gurley-shooting-death-arraignment.html; Jack Healy, *Ferguson, Still Tense, Grows Calmer*, N.Y. TIMES (Nov. 26, 2014), http://www.nytimes.com/2014/11/27/us/michael-brown-darren-wilson-ferguson-protests.html (discussing the public reaction to the shooting death of Michael Brown); Dana Ford & Ed Payne, *Ex-university Cop in Samuel DuBose Shooting Death Pleads Not Guilty*, CNN (July 31, 2015), http://www.cnn.com/2015/07/30/us/ohio-sam-dubose-tensing; Michael Martinez, *Report: Autopsy Shows Freddie Gray Suffered 'High-energy Injury,'* CNN (June 24, 2015),

deaths, government officials have spouted many of the same platitudes and promises for systemic change within police departments, pledging to discipline abusive officers, increase accountability, and review departmental policies on use of force.[21]

These promises—and the travesties from which they stem—are hardly new. After four Los Angeles Police Department officers were caught on video viciously beating Rodney King in 1991, the city of Los Angeles erupted into race riots.[22] Los Angeles mayor Tom Bradley pledged to conduct an investigation into the police department's internal disciplinary system, assuring the public that "[t]he men who beat Rodney King do not deserve to wear the uniform of the L.A.P.D."[23] Further, U.S. Attorney General Dick Thornburgh vowed to review every police brutality complaint made to the federal government within the past

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http://www.cnn.com/2015/06/23/us/baltimore-freddie-gray-death-officers-indicted-pleas.

21. *See, e.g.*, Chuck Raasch, *U.S. Attorney General Announces New Civil Rights Probe in Ferguson*, ST. LOUIS POST-DISPATCH (Sept. 5, 2014) http://www.stltoday.com/news/local/crime-and-courts/u-s-attorney-general-announces-new-civil-rights-probe-in/article_d2cd8f72-69a2-5afe-bbe0-8e4dfb371477.html (quoting Attorney General Eric Holder's promise, after Michael Brown's shooting death, to open a "fair, thorough investigation" that would result in "lasting, positive change" in the Ferguson Police Department); Andrew Tangel, *Civil-Rights Leaders Plan Washington March, New York City Mayor Vows Police Changes*, WALL ST. J. (Dec. 4, 2014) http://www.wsj.com/articles/mayor-bill-de-blasio-promises-overhaul-at-nypd-after-eric-garner-case-1417704263 (quoting New York City Mayor Bill de Blasio's pledge, after Eric Garner's death, to improve police officer training, and Governor Andrew Cuomo's pledge to "push for a review of police training and procedures"); Garrett W. Haake, *Baltimore Mayor Promises Answers in Freddie Gray's Death*, WUSA9 (Apr. 20, 2015, 11:45 PM), http://www.wusa9.com/story/news/2015/04/20/baltimore-mayor-promises-answers-in-freddie-gray-death/26106533.

22. *See* George Holliday, *Rodney King Beating Video Full Length Footage Screener*, YOUTUBE (Mar. 12, 2015), https://www.youtube.com/watch?v=sb1WywIpUtY.

23. Seth Mydans, *The Police Verdict; Los Angeles Policemen Acquitted in Taped Beating*, N.Y. TIMES (Apr. 30, 1992), http://www.nytimes.com/books/98/02/08/home/rodney-verdict.html.

six years.[24] In 1997, when New York Police Department officers falsely arrested and tortured Abner Louima, a black Haitian immigrant—injuring him so badly that he remained hospitalized for two months[25]—Mayor Rudy Giuliani publicly denounced the officers who attacked Louima, and the U.S. Attorney for the Eastern District of New York promised to "pull[] out the stops" in prosecuting the abusers.[26] Louima himself expressed hope that he would become a "symbol for change" in the way police officers treated minorities.[27] After Atlanta police officers shot and killed ninety-two-year-old Kathryn Johnston in 2006, and then planted drugs in her home in an attempt to cover up their misdeeds, the U.S. Attorney for the Northern District of Georgia promised that his office would begin investigating a "culture of misconduct" within the Atlanta Police Department,[28] and the Department of Justice (DOJ) issued a press release announcing that officers who ignored the Constitution could expect to be "vigorously prosecut[ed]."[29] And just two years before twelve-year-old Tamir Rice's killing, a group of thirteen Cleveland police officers fired 137 shots at Timothy Russell and Malissa Williams, killing the unarmed African American couple who had failed to pull over after a turn signal violation.[30] After

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24. Neil A. Lewis, *Police Brutality Under Wide Review by Justice Dept.*, N.Y. TIMES, Mar. 14, 1992, http://www.nytimes.com/learning/general/onthisday/big/0303.html; Mydans, *supra* note 23.

25. Sewell Chan, *The Abner Louima Case, 10 Years Later*, N.Y. TIMES: CITY ROOM (Aug. 9, 2007), http://cityroom.blogs.nytimes.com/2007/08/09/the-abner-louima-case-10-years-later.

26. Marie Brenner, *Incident in the 70th Precinct*, VANITY FAIR (Jan. 16, 2007, 12:00 AM), http://www.vanityfair.com/magazine/1997/12/louima199712.

27. *Id.*

28. Press Release, U.S. Dep't of Justice, Three Atlanta Police Officers Charged in Connection with the Fatal Shooting of an Elderly Atlanta Woman (Apr. 26, 2007), http://www.justice.gov/archive/usao/gan/press/2007/04-26-07.pdf.

29. Press Release, U.S. Dep't of Justice, Three Former Atlanta Police Officers Sentenced to Prison in Fatal Shooting of Elderly Atlanta Woman (Feb. 24, 2009), http://www.justice.gov/opa/pr/three-former-atlanta-police-officers-sentenced-prison-fatal-shooting-elderly-atlanta-woman.

30. *See, e.g.*, Matt Schiavenza, *'This is Straight Murder': A Troubling Acquittal in Cleveland*, THE ATLANTIC (May 23, 2015), http://www.theatlantic.com/national/archive/2015/05/this-is-straight-murder-a-troubling-acquittal-in-cleveland/394058; *Not Guilty: Judge Acquits Cleveland Ptl. Michael Brelo on All Counts*,

their deaths, the Cleveland police chief assured residents that the department would "make sure that any and all violations of our policies and procedures will be dealt with."[31]

The tragedy of minorities—particularly black men—being killed, abused, or harassed at the hands of police officers has long been and continues to be one of the great civil rights crises for our country. Although the legal community has known of and periodically wrung its hands about the policing problem for decades, we have made little progress in solving it. As lawyers, uniquely situated to influence or even dictate the practices of law enforcement, we should have a "capacity for moral indignation at injustice" that prompts us to seek lasting solutions to the ongoing outrage of abusive officers.[32]

This Article focuses on one aspect of solving the police misconduct crisis: changing how cities review, and respond to, citizen complaints about police misconduct. When misconduct goes unchecked, it alienates the very people the police are intended to serve, allows bad officers to thrive, and creates a fertile breeding ground for the abuses that the more vulnerable members of our society—especially poor minorities—have suffered for decades.[33]

The first purpose of this Article is to show that internal affairs review—in which the police department itself reviews

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NEWSNET5 (June 4, 2015, 6:29 PM), http://www.newsnet5.com/news/local-news/cleveland-metro/verdict-in-judge-to-announce-decision-in-cleveland-police-officer-michael-brelos-case.

31. Jason Hanna et al., *Cleveland Officer Not Guilty in Killing Unarmed Pair*, CNN (May 23, 2015), http://www.cnn.com/2015/05/23/us/cleveland-police-verdict.

32. I borrow this phrase from Stephen Wizner, *Beyond Skills Training*, 7 CLINICAL L. REV. 327, 330 (2001).

33. U.S. DEP'T OF JUSTICE, PROMOTING COOPERATIVE STRATEGIES TO REDUCE RACIAL PROFILING 21 (2008) ("Being viewed as fair and just is critical to successful policing in a democracy. When the police are perceived as unfair in their enforcement, it will undermine their effectiveness."); U.S. DEP'T OF JUSTICE, INVESTIGATION OF THE FERGUSON POLICE DEPARTMENT 2, 15 (2015), http://www.justice.gov/sites/default/files/opa/press-releases/attachments/2015/03/04/ferguson_police_department_report.pdf [hereinafter FERGUSON INVESTIGATION] (noting that Ferguson's pattern of "unconstitutional policing," which has gone unpunished for years, has "undermin[ed] law enforcement legitimacy among African Americans in particular").

claims of misconduct by officers within the force—is an irresponsible and, frankly, farcical method of responding to misconduct claims.[34] To echo scholar Walter Katz, the "system of internalized criminal investigations has been criticized for years for its inherent bias."[35] Repeated incidents of police misconduct, and the near-total failure of internal review systems to hold officers accountable for that misconduct, "perverts the rule of law, makes citizens distrustful of authority, and encourages further lawlessness by police officers."[36] Saying internal affairs units are the best means of protecting citizens from police misconduct is like saying foxes are the best guards for the henhouse—a notion even small children have found laughable for centuries.[37]

The other bookend to this Article is one which remains largely unexplored by legal scholars: if we are to end the internal affairs farce, what review system should replace it? Many cities, recognizing the futility of relying on police

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34. The argument could be made that internal affairs review serves exactly the purpose it was intended to accomplish, as it was never actually intended to correct police misconduct, but rather to simply stave off and obfuscate civilian attempts at holding officers accountable. This is a topic for another piece. For now, I assume that readers actually want to solve the problem of police misconduct.

35. Walter Katz, *Enhancing Accountability and Trust with Independent Investigations of Police Lethal Force*, 128 HARV. L. REV. FORUM 235, 238 (2015); *see also, e.g.*, John V. Jacobi, *Prosecuting Police Misconduct*, 2000 WIS. L. REV. 789, 792-802 (2000); Laurie L. Levenson, *Police Corruption and New Models for Reform*, 35 SUFFOLK U. L. REV. 1, 3 (2001); Kami Chavis Simmons, *Cooperative Federalism and Police Reform: Using Congressional Spending to Promote Police Accountability*, 62 ALA. L. REV. 351, 353-54 (2011).

36. Jacobi, *supra* note 35, at 802-03; *see also* AM. CIVIL LIBERTIES UNION OF CONN., PROTECT, SERVE AND LISTEN: ACCEPTING CIVILIAN COMPLAINTS AT CONNECTICUT POLICE DEPARTMENTS 1 (2012), https://www.acluct.org/wp-content/uploads/2012/12/protectservelisten.pdf ("Effective law enforcement depends on public trust in the police, which rests in large part on fair and transparent systems for handling civilian complaints of police misconduct."); Christopher R. Green, *Reverse Broken Windows*, 65 J. LEGAL EDUC. 265, 271 (2015) ("Officers who feel they can get away with unnecessarily harsh conduct or unjustifiably racially disparate patterns are more likely to feel they can get away with violating more serious norms.").

37. *See* Elyse Bruce, *Fox in the Henhouse*, HISTORICALLY SPEAKING (MAR. 6, 2013), https://idiomation.wordpress.com/tag/fox-in-the-henhouse (tracing the origins of the "fox guarding the henhouse" proverb to a children's nursery rhyme, a 1589 publication, and the Book of Luke in the New Testament Bible).

departments to police themselves, have attempted to institute various forms of civilian oversight.[38] For the most part, these have met with limited success. This is, I believe, one of the reasons cities still default to internal review: because figuring out how to staff, structure, and implement an effective independent review system is just too daunting.

This Article addresses the crisis of unchecked police misconduct in four parts. Part I details the appalling rate at which police officers in the United States kill, injure, abuse, or otherwise mistreat the people—in most cases, minorities—they have sworn to protect. Part II explains how internal review systems have allowed misconduct to flourish. Part III discusses the various independent review systems that some cities have adopted, and why they have, on the whole, had only marginal success in deterring police misconduct. In Part IV, I propose a model for what an effective independent review agency could look like—which actors should be included in the independent review agency, how the agency should be structured, and what kind of authority the agency should possess.

I. THE EFFECTS OF POLICE MISCONDUCT ON COMMUNITIES OF COLOR

Police officers in the United States kill their constituents at a stunning rate. In the first twenty-four days of 2015, U.S. police officers killed fifty-nine people—well over two per day, and four more than police officers in England and Wales killed in the last twenty-four *years* combined.[39] In March of 2015, U.S. police officers killed ninety-seven people, or three more than Australian police killed over the twenty-year period from 1992 through 2011.[40] Even in Utah—hardly

38. A list of many of the civilian oversight agencies in the country can be found on the National Association for Civilian Oversight of Law Enforcement (NACOLE) website. *See Agency Profiles*, NAT'L ASS'N FOR CIVILIAN OVERSIGHT OF LAW ENFORCEMENT, https://nacole.org/nacole-resources/oversight-agencies/links-to-oversight-agencies-u-s (last visited May 26, 2016).

39. Jamiles Lartey, *By the Numbers: US Police Kill More in Days Than Other Countries Do in Years*, THE GUARDIAN (June 9, 2015), http://www.theguardian.com/us-news/2015/jun/09/the-counted-police-killings-us-vs-other-countries.

40. *Id.*

known as an epicenter of police violence—fifteen percent of homicides from 2010 to 2014 were committed by police officers.[41]

The victims of police killings are disproportionately minorities. African Americans represent just thirteen percent of the U.S. population but account for over thirty percent of people killed by police.[42] Between 2010 and 2014, unarmed black people were 3.49 times more likely to be shot by police than unarmed white people.[43] The number is drastically higher in certain large counties: in Miami-Dade County, unarmed black people were twenty-two times more likely to be shot by police than unarmed white people, and in the counties that encompass Los Angeles and New Orleans, unarmed black people were ten and nine times more likely, respectively, to be victims of police shootings than their white counterparts.[44] In Cook County, Illinois, which includes the city of Chicago, *unarmed* black people were five times more likely to be shot by police than *armed* white people.[45] In almost every county in the country, unarmed victims of police

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41. Erin Alberty, *Killings by Utah Police Outpacing Gang, Drug, Child-Abuse Homicides*, SALT LAKE TRIB. (Nov. 23, 2014), http://www.sltrib.com/news/1842489-155/killings-by-utah-police-outpacing-gang.

42. Sendhil Mullainathan, *Police Killings of Blacks: Here is What the Data Says*, N.Y. TIMES (Oct. 16, 2015), http://www.nytimes.com/2015/10/18/upshot/police-killings-of-blacks-what-the-data-says.html?_r=0. The disproportionate representation of minorities as targets of police suspicions plays out across the spectrum of the justice system. *See generally, e.g.*, Loïc Wacquant, *Class, Race & Hyperincarceration in Revanchist America*, DÆDALUS, Summer 2010, at 74, 74 (discussing how the police, courts, and corrections system have systematically targeted the "black underclass" for decades); Robynn J.A. Cox, *Where Do We Go from Here? Mass Incarceration and the Struggle for Civil Rights*, ECON. POL'Y INST. (Jan. 16, 2015), http://www.epi.org/files/2014/MassIncarcerationReport.pdf.

43. Cody T. Ross, *The United States Police-Shooting Database: A Multi-Level Bayesian Analysis of Racial Bias in Police Shootings at the County-Level in the United States, 2011-2014*, at 5 (Dec. 8, 2014), http://papers.ssrn.com/sol3/Papers.cfm?abstract_id=2534673. These records included both police shootings that killed their victims, and shootings where the victims survived.

44. *Id.*; *see also Officer Involved: A KPCC Investigation Into Police Shootings in Los Angeles County*, KPCC, http://projects.scpr.org/officer-involved/#12 (last visited May 26, 2016) (discussing how law enforcement officers in Los Angeles County fatally shot black people at triple the rate of white people).

45. Ross, *supra* note 43, at 5.

shootings were much more likely to be black or Hispanic than white.[46] The statistics are even worse for young black men: during the years 2010 through 2012, black teenagers between the ages of fifteen and nineteen were twenty-one times more likely to be killed by police than their white counterparts.[47]

Shootings are not the only kind of terror police officers inflict on minorities. Recent investigations by the DOJ's Civil Rights Division have revealed that officers in many cities use unconstitutionally excessive force during their encounters with minorities,[48] stop and frisk minorities without any legal justification,[49] systematically arrest and charge minorities

46. *Id.* at 7.

47. Ryan Gabrielson et al., *Deadly Force, In Black and White*, PROPUBLICA (Oct. 10, 2014), http://www.propublica.org/article/deadly-force-in-black-and-white. This statistic is drawn from FBI data for the years 2010-2012. *Id.*

48. *See, e.g.*, FERGUSON INVESTIGATION, *supra* note 33, at 5, 28 ("Nearly 90% of documented force used by FPD officers was used against African Americans."); U.S. DEP'T OF JUSTICE, INVESTIGATION OF THE CLEVELAND DIVISION OF POLICE 12-24 (2014), http://www.justice.gov/sites/default/files/opa/press-releases/attachments/2014/12/04/cleveland_division_of_police_findings_letter.pdf [hereinafter CLEVELAND INVESTIGATION], (detailing patterns of excessive force by Cleveland police officers); U.S. DEP'T OF JUSTICE, INVESTIGATION OF THE NEW ORLEANS POLICE DEPARTMENT 3-9 (2011), https://s3.amazonaws.com/s3.documentcloud.org/documents/74332/justice-department-report-on-the-new-orleans.pdf [hereinafter NEW ORLEANS INVESTIGATION] (discussing "use of unreasonable force" by New Orleans police officers).

49. New York City's stop-and-frisk policy, which a federal court found to have disproportionately targeted and impacted minorities, is perhaps the most well-known example of this. *See* Floyd v. City of New York, 959 F. Supp. 2d 540, 557 (S.D.N.Y. 2013) (finding NYC's stop-and-frisk policy unconstitutional, and noting that the people subjected to stops were "overwhelmingly people of color, and they are justifiably troubled to be singled out when many of them have done nothing to attract the unwanted attention"); *see also* FERGUSON INVESTIGATION, *supra* note 33, at 18 (describing Ferguson Police Department's pattern of "suspicionless, legally unsupportable stops" of African American residents); Nicole Flatow, *If You Thought Stop-and-Frisk Was Bad, You Should Know About Jump-Outs*, THINK PROGRESS (Dec. 10, 2014), http://thinkprogress.org/justice/2014/12/10/3468340/jump-outs. "Jump-out" is the colloquial term many Washington, D.C. residents use to describe unmarked police cars whose occupants conduct surprise stops and frisks of unsuspecting residents. According to Flatow, jump-outs are "for many black residents the mark of policing problems in the nation's capital: militaristic, seemingly arbitrary, and reeking of racial disparity." *Id.*; U.S. DEP'T. OF JUSTICE, INVESTIGATION OF THE NEWARK POLICE DEPARTMENT 2, 16 (2014), https://perma.cc/PE2D-2LBG?type=pdf [hereinafter NEWARK INVESTIGATION]

for nonviolent crimes far more aggressively than they enforce similar crimes in white communities,[50] and arrest poor minorities—subjecting many of them to jail time—for minor unpaid fines.[51]

Not surprisingly, the relationship between police departments and minority communities has been fraught with tension for years. Gallup polls conducted biannually since 1985 show that, over the past thirty years, consistently less than one-half of surveyed minorities nationwide express confidence that the police will either serve or protect them, and many believe that the police would be willing to use excessive force on them.[52] Sadly, this fear is justified: as civil rights scholar Kami Chavis Simmons has written:

(finding that the Newark Police Department stops minorities at a far greater rate than whites, often with no constitutional justification).

50. FERGUSON INVESTIGATION, *supra* note 33, at 4-5 (noting that Ferguson police enforced certain minor offenses, such as traffic offenses or failure to comply with police orders, "almost exclusively" against African Americans); *see also* Alec Karakatsanis, *Policing, Mass Imprisonment, and the Failure of American Lawyers*, 128 HARV. L. REV. FORUM 253, 256 (2015) ("If nonviolent criminal laws were enforced on college campuses or investment banks for just a single day in the same rates as in poor communities, there would be twenty-four-hour news vans outside of every local jail and immediate public hearings about the harshness and efficacy of our legal system."); Flatow, *supra* note 49 (noting that black people in Washington, D.C. were, as of 2014, eight times more likely than white people to be arrested for marijuana possession).

51. *See* FERGUSON INVESTIGATION, *supra* note 33, at 2-4 (describing how the Ferguson police department's emphasis on generating city revenue by ticketing citizens, and arresting them for unpaid fines, "raise[s] due process concerns and inflict[s] unnecessary harm on members of the Ferguson community"); *id.* at 2 ("[M]any officers appear to see some residents, especially those who live in Ferguson's predominantly African-American neighborhoods, less as constituents to be protected than as potential offenders and sources of revenue."); Karakatsanis, *supra* note 50, at 262-63 (discussing the rise of "modern debtors' prisons" in which local police routinely arrest and incarcerate poor people for failing to pay fines they cannot afford to pay); *see generally* AM. CIVIL LIBERTIES UNION, IN FOR A PENNY: THE RISE OF AMERICA'S NEW DEBTORS PRISONS (Oct. 2010) (discussing the incarceration of defendants unable to pay their legal debts).

52. Justin McCarthy, *Nonwhites Less Likely to Feel Police Protect and Serve Them,* GALLUP (Nov. 17, 2014), http://www.gallup.com/poll/179468/nonwhites-less-likely-feel-police-protect-serve.aspx. While the percentage of white people who expressed confidence in the police has risen as high as seventy-two percent during this same time period, the percentage of minorities expressing the same confidence has never been over fifty-two percent, and has fallen as low as thirty-

> [i]f the distrust among minority communities was simply due to misperceptions or unsubstantiated allegations of police bias, it might be easier to develop solutions to ease this distrust. Unfortunately, empirical evidence supports the notion that African Americans' perceptions of mistreatment and differential treatment by the criminal-justice system are in fact substantiated.[53]

A report by the U.S. Commission on Civil Rights backs up this claim, noting that poor people and minorities have consistently borne the brunt of police brutality, harassment, and misconduct.[54] The report concluded, "[i]n their eagerness to achieve important goals such as lowering crime, some police officers overstep their authority, trample on individuals' civil rights, and may cause entire communities to fear the same people they hired and trusted to protect them."[55] Violence directed toward poor minorities has been a "common characteristic of police abuse in America" for decades.[56]

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three percent. *Id.*; *see also* Jens Manuel Krogstad, *Latino Confidence in Local Police Lower Than Among Whites,* PEW RESEARCH CTR. (Aug. 28, 2014), http://www.pewresearch.org/fact-tank/2014/08/28/latino-confidence-in-local-police-lower-than-among-whites (concluding that Hispanics are significantly less likely than white people to express confidence in the ability of the police to treat races equally, avoid excessive force, or do "a good job enforcing the law").

53. Kami Chavis Simmons, *New Governance and the "New Paradigm" of Police Accountability: A Democratic Approach to Police Reform*, 59 CATH. U. L. REV. 373, 412-13 (2010).

54. *Revisiting* Who Is Guarding the Guardians?, U.S. COMM'N ON C.R. (2000), http://www.usccr.gov/pubs/guard/exsum.htm.

55. *Id.*

56. Levenson, *supra* note 35, at 13; *see also* FERGUSON INVESTIGATION, *supra* note 33, at 5 ("[D]istrust of the Ferguson Police Department is longstanding and largely attributable to Ferguson's approach to law enforcement."); NEWARK INVESTIGATION, *supra* note 49, at 17 ("Newark's black residents bear the brunt of the NPD's pattern of unconstitutional policing. This undeniable experience of being disproportionately affected by the NPD's unconstitutional policing helps explain the community distrust and cynicism that undermines effective policing in Newark."); Jason Sunshine & Tom R. Tyler, *The Role of Procedural Justice and Legitimacy in Shaping Public Support for Policing*, 37 LAW & SOC'Y REV. 513, 515 (2003) ("[S]tudies of public views about the police typically reveal large racial and ethnic group differences, with minority group members expressing much more negative attitudes about the police and having lower trust and confidence in institutions of social control."); Jeremy Travis et al., *Exploring the Role of the Police in Prisoner Reentry*, NEW PERSP. POLICING BULL., (Nat'l Inst. of Justice)

Even the financial costs of police misconduct have not, thus far, inspired cities to reform their police departments' treatment of minorities. Over the last decade, Chicago has spent more than $520 million on lawsuits related to police misconduct claims, many of which involved claims of maltreatment of African Americans.[57] In fiscal year 2012 alone, New York City paid a staggering $152 million in tort claims, which include misconduct and civil rights violations, against the New York City Police Department.[58] In 2015, Baltimore reached a $6.4 million settlement over the death of twenty-five-year-old Freddie Gray, a black man, while in police custody.[59] Cleveland paid $3 million to the families of Timothy Russell and Malissa Williams, the unarmed African

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July 2012, at 3, https://www.ncjrs.gov/pdffiles1/nij/238337.pdf (noting that in some communities, cooperation with police is considered "tantamount to working with the enemy"). Although the victims of police shootings are generally men, minority women have also long borne the brunt of police brutality. *See, e.g.*, Zoe Carpenter, *The Police Violence We Aren't Talking About*, THE NATION (Aug. 27, 2014), http://www.thenation.com/article/police-violence-we-arent-talking-about; Chaédria Labouvier, *How Many Viral Videos Will It Take? Another Reminder of the Vulnerability of the Black Girl in America*, ELLE (Oct. 28, 2015), http://www.elle.com/culture/career-politics/a31527/do-we-need-another-video-to-remind-us-that-black-girls-are-the-most-vulnerable ("Do we need more videos of black girls dragged across school floors and front lawns to know that this is how black women are treated when they have the misfortune of encountering the police and the white male rage that so often seems part and parcel of the job?"); Erick A. Paulino, *Deconstructing the Arrest of Sandra Bland*, THE FEMINIST WIRE (Aug. 4, 2015), http://www.thefeministwire.com/2015/08/deconstructing-the-arrest-of-sandra-bland ("in challenging . . . police brutality against people of color, #BlackLivesMatter activism must pay particular attention to how police exercise force differently for men and women").

57. Andrew Schroedter, *Beyond Burge*, BETTER GOV'T ASS'N (Apr. 3, 2014), http://www.bettergov.org/beyond_burge/; *see also* Mitch Smith & Monica Davey, *Chicago to Pay $5 Million to Victims of Police Abuse*, N.Y. TIMES (May 6, 2015), http://www.nytimes.com/2015/05/07/us/chicago-to-pay-5-million-to-victims-of-police-abuse.html?_r=0.

58. JOHN C. LIU, CITY OF NEW YORK: OFFICE OF THE COMPTROLLER, CLAIMS REPORT: FISCAL YEAR 2012, at 5, 43, 44 chart 18 (2013), http://comptroller.nyc.gov/wp-content/uploads/documents/2013_Claims-Report.pdf.

59. Sheryl Gay Stolberg, *Baltimore Announces $6.4 Million Settlement in the Death of Freddie Gray*, N.Y. TIMES (Sept. 8, 2015), http://www.nytimes.com/2015/09/09/us/freddie-gray-baltimore-police-death.html?smid=tw-bna&_r=0.

American couple who police officers shot at 137 times,[60] and reached a separate settlement with the DOJ over patterns of abusive policing.[61] The Albuquerque Police Department was ordered to pay $4.25 million to the estate of a man killed by Albuquerque police officers,[62] and, in a separate case, the City of Albuquerque was found liable for $10 million in damages to the estate of a military veteran shot and killed by police.[63] The City of Charlotte, North Carolina settled a wrongful death lawsuit brought by the family of Jonathan Ferrell, a black man killed by a white police officer, for $2.25 million.[64] Many other cities are paying the heavy costs of defending their police departments against civil rights lawsuits alleging patterns and practices of abusive policing.[65]

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60. CLEVELAND INVESTIGATION, *supra* note 48, at 9.

61. Mitch Smith & Matt Apuzzo, *Cleveland Reaches Settlement with Justice Department over Police Conduct*, N.Y. TIMES (May 25, 2015), http://www.nytimes.com/2015/05/26/us/cleveland-police.html?_r=0.

62. U.S. DEP'T OF JUSTICE, INVESTIGATION OF ALBUQUERQUE POLICE DEPARTMENT 11 (2014), http://www.justice.gov/crt/about/spl/documents/apd_findings_4-10-14.pdf [hereinafter ALBUQUERQUE INVESTIGATION]. In 2013 the Albuquerque Police Department settled another case, involving the death of another man at the hands of Albuquerque police officers, for $900,000. *Id.* at 12.

63. *Id.* at 13.

64. Jonathan M. Katz, *Trial Opens for Charlotte Officer Who Fatally Shot Black Motorist Seeking Help*, N.Y. TIMES (Aug. 3, 2015), http://www.nytimes.com/2015/08/04/us/trial-opens-for-charlotte-officer-who-fatally-shot-black-motorist-seeking-help.html. The criminal trial against Ferrell's killer ended in a hung jury, and the Charlotte prosecutor's office has announced that it has no intention of retrying the officer. Jonathan Katz, *No Retrial for North Carolina Officer Who Killed Unarmed Man*, N.Y. TIMES (Aug. 28, 2015), http://www.nytimes.com/2015/08/29/us/jonathan-ferrell-police-shooting.html?_r=0.

65. *See e.g.*, Velazquez v. City of Long Beach, 793 F.3d 1010, 1028 (9th Cir. 2015) (reversing grant of summary judgment motion in favor of city, and finding that reasonable jury could have found that City of Long Beach was "aware that [a police officer] had previously used excessive force when making arrests, but had taken no steps to curb his propensity"); Noble v. City of Camden, 112 F. Supp. 3d 208, 222 (D.N.J. 2015) (finding that plaintiff in a § 1983 lawsuit "provided sufficient evidence from which a reasonable jury could conclude that the City [of Camden] was deliberately indifferent in investigating claims of excessive force" by police officers); Galindez v. Miller, 285 F. Supp. 2d 190, 197-99 (D. Conn. 2003) (denying summary judgment for similar reasons).

Identifying the problem is one thing; fixing it is another. After decades of violent policing, periodic protests, and calls for reform, our country still wrestles with the same issues, and can point to little or no progress. Just one recent example of the grave disconnect between police departments and many people of color is the hashtag #IfIDieInPoliceCustody, which began trending on Twitter in July of 2015 after the suspicious death of Sandra Bland, an African American woman who had been arrested after a minor traffic violation, and died while in custody of the Waller County, Texas Sheriff's Office.[66] In Los Angeles, protesters recently made news for disrupting meetings of the Los Angeles Police Commission, demanding greater transparency in officer use-of-force investigations and appointment of a community activist to the Police Commission.[67] Movements like Black Lives Matter are demanding policing reform in nearly every major city across the country.[68] But when citizens complain

66. *See, e.g.*, Taryn Finley, *#IfIDieInPoliceCustody: Twitter Responds to Sandra Bland's Death with Heartbreaking Hashtag*, HUFFINGTON POST (July 17, 2015), http://www.huffingtonpost.com/entry/twitter-responds-to-the-suspiciousness-of-sandra-blands-death-with-ifidieinpolicecustody_55a8feeee4b04740a3dfa386. Some of the tweets included: "#IfIDieInPoliceCustody tell them I sagged my pants, smoked weed, and wore hoodies. Ask them if those things warranted my execution." @See_Say_92, TWITTER (July 16, 2015, 4:57 PM) https://twitter.com/See_Say_92/status/621831095911251968?ref_src=twsrc%5Etfw; "#IfIDieInPoliceCustody Don't call for peace. Call for action." @MalePocahontas, TWITTER, (July 16, 2015, 5:29 PM), https://twitter.com/MalePocahontas/status/621839019899355136?ref_src=twsrc%5Etfw; and "#IfIDieInPolice Custody my murderer will go free & America will blame me" @Fiorentina5, TWITTER (Dec. 28, 2015, 1:31 PM), https://twitter.com/Fiorentina5/status/681588213941587968. The trooper who arrested Bland was later charged with perjury, for filing an affidavit claiming that he removed Bland from her car only in order to conduct a safe traffic stop investigation. *See* David Montgomery, *Texas Trooper Who Arrested Sandra Bland Is Charged with Perjury*, N.Y. TIMES (Jan. 6, 2016), http://mobile.nytimes.com/2016/01/07/us/texas-grand-jury-sandra-bland.html?smid=tw-bna&referer=https://t.co/3xXvrUWSmv.

67. Times Editorial Bd., *Police Commission Must Stop Stonewalling Activists*, L.A. TIMES (Oct. 5, 2015), http://www.latimes.com/opinion/editorials/la-ed-police-commission-chaos-20151005-story.html.

68. There is reason to believe that these movements are gaining political power. Anita Alvarez and Timothy McGinty, the Cook County and Cuyahoga County prosecutors who dragged their feet in prosecuting the police officers who killed Laquan McDonald and Tamir Rice, respectively, have since both been voted out of office, during elections dominated by opponents who vocalized disgust over

of misconduct by police officers, the primary mechanism for reviewing those claims is still, in most cities, to entrust them to internal affairs units within police departments. These units fall woefully short of fulfilling their duties to investigate, punish, and deter misconduct.

II. THE FARCE OF INTERNAL AFFAIRS

In his book *Between the World and Me*, Ta-Nehisi Coates writes of a police officer in Prince Georges County, Maryland, who killed an unarmed black man: "[the] officer, given maximum power, bore minimum responsibility. He was charged with nothing. He was punished by no one. He was returned to his work."[69] The phenomenon Coates describes—an armed officer who, having sworn to protect a community, instead shoots and kills one of its members without repercussion—is devastatingly familiar to many minorities.[70] The ability of officers to commit violent acts with impunity is due in no small part to internal review systems that routinely turn their backs to police misconduct.

Internal review refers to the practice of relying on police officers—typically working in a unit known as Internal Affairs—to handle investigations into alleged misconduct by other officers within the same department.[71] For most police

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the lack of governmental response to these shootings. *See* Claire Landsbaum, *Prosecutor Anita Alvarez Loses Chicago Reelection in Wake of Laquan McDonald Controversy*, NY MAG. (Mar. 16, 2016), http://nymag.com/daily/intelligencer/2016/03/chicago-prosecutor-anita-alvarez-ousted.html#; Jane Morice, *The Nation Reacts to Ouster of Tamir Rice Prosecutor Timothy J. McGinty*, CLEVELAND.COM (Mar. 16, 2016, 4:52 PM), http://www.cleveland.com/metro/index.ssf/2016/03/the_nation_reacts_to_ouster_of.html.

69. TA-NEHISI COATES, BETWEEN THE WORLD AND ME 80 (2015).

70. For example, Richard Haste, the white New York Police Department officer who shot and killed seventeen-year-old Ramarley Graham, an unarmed African American teenager, has since been promoted and received $25,000 in pay increases in the four years since he killed Graham. *NYPD Officer Who Shot Unarmed Ramarley Graham Received $25K in Raises*, DEMOCRACY NOW! (Dec. 23, 2015), http://www.democracynow.org/2015/12/23/headlines/nypd_officer_who_shot_unarmed_ramarley_graham_received_25k_in_raises.

71. There are no national standards for internal affairs units, so each unit may operate differently. For readers entirely unfamiliar with the internal affairs review process and how it may work, I recommend two works: U.S. DEP'T OF

departments across the United States, internal affairs units review the majority of civilian complaints regarding officer misconduct.[72] Allowing officers within the same police department to investigate each other presents a variety of problems throughout the entire complaint process, from intake to investigation to decision-making and discipline. Although the reports, surveys, and anecdotes discussed below are not exhaustive, they provide a taste of the pitfalls inherent—and existent—in internal review processes around the country.

A. *Police Departments Routinely Deter Citizens from Reporting Officer Misconduct*

The first step in the complaint process is, of course, making a complaint. Typically, police departments rely on an internal affairs unit to review those complaints, which means the citizen reporting the complaint must do so to another officer within the same police department as the officer about whom she is complaining. It should come as no surprise that such complaints are often met with skepticism or, worse, open hostility. After James Fields, a black man in Greensboro, North Carolina, filed a complaint alleging that police officers had falsely arrested him, he reported that a patrol car parked outside his house every night for a month, serving as a silent warning about the consequences of making such claims.[73] When Randall Yorker, a father in Manalapan,

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JUSTICE, STANDARDS AND GUIDELINES FOR INTERNAL AFFAIRS: RECOMMENDATIONS FROM A COMMUNITY OF PRACTICE, http://ric-zai-inc.com/Publications/cops-p164-pub.pdf (providing guidelines for what should happen when a civilian files a complaint with an internal affairs unit); and Ryan J. Reilly, *Here's What Happens When You Complain to Cops About Cops*, HUFFINGTON POST (Oct. 13, 2015), http://www.huffingtonpost.com/entry/internal-affairs-police-misconduct_us_5613ea2fe4b022a4ce5f87ce (discussing what actually does happen when a citizen tries to file a complaint with an internal affairs unit).

72. MATTHEW J. HICKMAN, BUREAU OF JUSTICE STATISTICS, CITIZEN COMPLAINTS ABOUT POLICE USE OF FORCE 4 (2006), http://www.bjs.gov/content/pub/pdf/ccpuf.pdf.

73. *See* Sharon LaFraniere & Andrew W. Lehren, *The Disproportionate Risks of Driving While Black*, N.Y. TIMES (Oct. 24, 2015), http://www.nytimes.com/2015/10/25/us/racial-disparity-traffic-stops-driving-black.html?smid=tw-

New Jersey, went to the police department to report that his teenage son had been harassed by a police officer, the officer receiving the complaint called him a "negro," rolled up the complaint, and stuffed it into his back pocket.[74] In Connecticut, the American Civil Liberties Union (ACLU) conducted a survey of Connecticut police departments—using anonymous volunteers who asked police officers questions about the complaint-reporting process—and discovered "widespread resistance to accepting misconduct complaints."[75] Several police officers refused to answer any questions about the intake process, others declined to accept the complaint unless the complainant reported in person to the police station, and still others said that civilians simply could not complain about minor issues like an officer's discourtesy.[76]

Even when a police department's resistance to receiving complaints does not manifest itself in overt hostility, it can take more subtle forms, such as imposing unnecessarily complicated requirements on civilians attempting to file complaints. The ACLU survey found that the majority of Connecticut police departments refused to accept anonymous complaints, third-party complaints, or complaints from minors unaccompanied by a parent or guardian.[77] The Cleveland Department of Police had even stricter requirements, refusing to investigate unless the complainant both identified himself by name and signed the complaint.[78] Many police departments also require civilians to swear to the complaint under penalty of perjury, and threaten complainants with the possibility of prosecution for false

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nytnational&smtyp=cur&_r=0. The police department later rejected every one of the allegations in Fields's complaint. *Id.*

74. AM. CIVIL LIBERTIES UNION OF N.J., THE CRISIS INSIDE POLICE INTERNAL AFFAIRS 5 (2009), https://www.aclu-nj.org/files/3013/1540/4573/060409IA2.pdf.

75. AM. CIVIL LIBERTIES UNION OF CONN., *supra* note 36, at 1.

76. *Id.* at 2, 5-6.

77. *Id.* at 6.

78. CLEVELAND INVESTIGATION, *supra* note 48, at 38-40.

statements.[79] Other departments warn non-citizens that making a complaint exposes them to the possibility of deportation.[80] All of these practices—preventing people from making complaints, or warning them about the possibility of dire consequences if they do—serve to deter people from making complaints, particularly the minorities and immigrants who are most likely to be victimized by police misconduct.

B. *Even When People File Complaints, Police Departments Frequently Fail to Investigate Them*

Civilians who endure the intake process and file a complaint have little assurance that it will ever be investigated. The DOJ has investigated police departments across the country for civil rights violations, and found repeated instances in which civilians' complaints reported through an internal intake process were never investigated. When the DOJ investigated the Ferguson, Missouri Police Department in the wake of Michael Brown's death at the hands of officer Darren Wilson, it found that Ferguson police officers "rarely respond meaningfully to civilian complaints of officer misconduct," and such complaints had a "significant likelihood" of going uninvestigated.[81] The Cleveland Department of Police, when asked in 2014 to produce final dispositions for civilian complaints filed within the last two years, was unable to do so; its files were so disorganized that it could not even say whether the complaints had been investigated.[82]

Other police departments have investigation policies in place but do not follow them. Until very recently, the Newark, New Jersey Police Department had a policy that, when it received a civilian complaint of officer misconduct, the Internal Affairs Unit was required to investigate the allegation, document whatever investigative steps it took,

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79. AM. CIVIL LIBERTIES UNION OF CONN., *supra* note 36, at 6, 8; AM. CIVIL LIBERTIES UNION OF N.J., *supra* note 74, at 9.

80. *See* sources cited *supra* note 79.

81. FERGUSON INVESTIGATION, *supra* note 33, at 2, 83.

82. CLEVELAND INVESTIGATION, *supra* note 48, at 11.

and record its ultimate findings.[83] In practice, however, the unit simply did not follow this procedure and many complaints were not properly investigated.[84] A DOJ investigation into the New Orleans Police Department revealed even more systemic problems. In addition to being so disorganized that it could not say whether certain complaints had ever been investigated, the New Orleans police failed to track any allegations regarding discriminatory policing and systematically excluded many serious misconduct claims from investigation altogether.[85]

The DOJ is by no means the only agency to uncover evidence of woefully inadequate, or nonexistent, internal investigations. In Denver, the Office of the Independent Monitor found that, between 2011 and 2013, the Denver Sheriff's Department's Internal Affairs Bureau received fifty-four complaints alleging serious misconduct by deputy sheriffs and investigated only nine.[86] Of the nine investigations it did conduct, six occurred only after the Bureau initially ignored the complaints, and the complainants then filed separate grievances through an outside agency.[87] Had those complainants not persisted after the Internal Affairs Bureau ignored them, it appears that the Bureau would not have investigated those six complaints

83. *See* NEWARK INVESTIGATION, *supra* note 49, at 37. In January of 2015, Newark's mayor announced the creation of a new civilian complaint review board designated to review many complaints of officer misconduct. *See* Mark Bonamo, *Newark Mayor Baraka, Police Department Announce Creation of Civilian Complaint Review Board*, POLITICKER N.J. (Jan. 20, 2015), http://politickernj.com/2015/01/newark-mayor-baraka-police-department-announce-creation-of-civilian-complaint-review-board/.

84. *See* NEWARK INVESTIGATION, *supra* note 49, at 38-39.

85. NEW ORLEANS INVESTIGATION, *supra* note 48, at xvii-xviii, 79-80, 83-84, 88.

86. OIR GROUP, REPORT ON THE USE OF FORCE & INTERNAL AFFAIRS OPERATIONS IN THE DENVER SHERIFF DEPARTMENT 47 (2015), http://oirgroup.com/oirgroup.com/About_files/Report%20on%20the%20Use%20of%20Force%20%26%20Internal%20Affairs%20Operations%20in%20the%20Denver%20Sheriff%20Department,%202015.pdf.

87. DENVER OFFICE OF THE INDEP. MONITOR, 2013 SEMIANNUAL REPORT 12 (2013), https://www.denvergov.org/Portals/374/documents/Semiannual_Report_Final_2013-12-02.pdf.

either.[88] Even after the Independent Monitor issued this report, the problem persisted: in 2015, the Independent Monitor identified another series of complaints that the Internal Affairs Bureau had received and classified as needing investigation but had not actually bothered to investigate.[89]

Investigative inertia is also not limited to major cities with overwhelming caseloads. Evidence presented in a federal lawsuit revealed that the Internal Affairs Unit for the Camden, New Jersey Police Department had 128 pending allegations of excessive force by police officers over a one-year period and investigated only eleven.[90] The next year, the Internal Affairs Unit had a backlog of 174 cases involving claims of excessive force, and investigated a mere six.[91] In Newark, residents reported filing complaints with the Internal Affairs Unit and receiving little or no subsequent contact from investigators.[92] When investigators did contact complainants, they routinely failed to follow up with the complainants to clarify facts critical to misconduct investigations.[93] Internal affairs investigators in the Albuquerque Police Department also frequently failed to interview civilians who had identified themselves as witnesses to police officers' use of force.[94] A review of the Santa Maria, California Police Department revealed that the department had received numerous civilian complaints that it never looked into at all.[95]

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88. *See id.*

89. DENVER OFFICE OF THE INDEP. MONITOR, 2015 SEMIANNUAL REPORT 32, https://www.denvergov.org/content/dam/denvergov/Portals/374/documents/OIM_2015_Semiannual_Report_FINAL.pdf.

90. Noble v. City of Camden, 112 F. Supp. 3d 208, 217 (D.N.J. 2015).

91. *Id.*

92. NEWARK INVESTIGATION, *supra* note 49, at 38.

93. *Id.*

94. ALBUQUERQUE INVESTIGATION, *supra* note 62, at 29 (concluding that the internal affairs unit was "deficient in carrying out one of its most basic duties").

95. MICHAEL GENNACO ET AL., OIR GROUP, REPORT TO THE CITY OF SANTA MARIA ON SANTA MARIA POLICE DEPARTMENT 17-19 (2014), http://oirgroup.com/oirgroup.com/Reports_files/santa%20maria%20public%20report%20final.pdf.

C. *When Investigations Do Happen, They Are Heavily Biased in Favor of the Officers Under Investigation*

Internal investigations are notoriously biased in favor of fellow officers. As Professor Chavis Simmons notes, "[p]erhaps the strongest criticism of internal police investigations is that the officers investigating these reports have an inherent inability to conduct impartial investigations."[96] This partiality manifests itself in a number of ways. As one example, internal affairs units often set impossibly stringent standards for sustaining civilian complaints. The Cleveland Internal Affairs Unit will sustain a complaint, and find that the officer violated policy, only if the allegations are proven beyond a reasonable doubt—the highest standard in American law, and one virtually never used for administrative review.[97] During DOJ interviews with Internal Affairs Unit investigators, several officers admitted that their goal in investigations was to cast the accused officers in the best light possible.[98] The DOJ report concluded that the Internal Affairs Unit's "admitted bias appears deeply rooted" and "cuts at the heart of the accountability system" within the Cleveland Police Department.[99]

The San Jose, California Police Department has a different method for all but guaranteeing that civilian complaints will ultimately fail. The San Jose police handle all allegations of racially-biased policing with a two-step procedure: (1) asking the accused officer if race was a factor in his interactions with the complainant; and (2) requiring the complainant to prove that the officer's actions were motivated by race.[100] Not surprisingly, the officers regularly deny that race was a factor in their actions, and the

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96. Kami Chavis Simmons, *The Politics of Policing: Ensuring Stakeholder Collaboration in the Federal Reform of Local Law Enforcement Agencies*, 98 J. CRIM. L. & CRIMINOLOGY 489, 503 (2008).

97. CLEVELAND INVESTIGATION, *supra* note 48, at 5, 35.

98. *Id.* at 5.

99. *Id.*

100. CITY OF SAN JOSE, OFFICE OF THE INDEP. POLICE AUDITOR, 2014 IPA YEAR END REPORT 63, http://www.sanjoseca.gov/DocumentCenter/View/42029.

complainants are unable to prove that the officers were motivated by racial bias. As of 2014, the San Jose Police Department had never once sustained a complaint of racially-biased policing.[101]

In other internal affairs units, the standards used to assess a complaint are essentially irrelevant, because investigators ignore even the most obvious evidence of officer misconduct. In Newark, the Internal Affairs Unit sustained between four and seven percent of civilian complaints in the years spanning 2010 through 2012.[102] Although the unit was aware that the police department had a serious theft problem—it had received multiple complaints from arrestees whose personal property was stolen during the arrest or booking process, and many of these arrestees had identified the same officers as responsible for the thefts—the Internal Affairs Unit did not sustain a single theft complaint against these officers.[103] In a lawsuit filed against the City of Newark, an expert testified that, after evaluating civilian complaints and disciplinary records of accused officers, it was clear that the department had a pattern of "almost invariably reject[ing]" civilian complaints.[104] The expert concluded that the Newark Police Department paid "little or no attention to complaints from citizens."[105]

After the Connecticut Attorney General's office reviewed the Connecticut State Police internal affairs system, it reported that the review process was "so ineffective," and the agency's predilection to ignore or justify officer misconduct was "so strong," that officers were virtually guaranteed to avoid discipline for even criminal behavior.[106] Sometimes this

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101. *Id.* at 9.

102. NEWARK INVESTIGATION, *supra* note 49, at 35.

103. *Id.* at 31.

104. Garcia v. City of Newark, No. 08-1725 (SRC), 2011 WL 689616, at *4 (D.N.J. Feb. 16, 2011).

105. *Id.* at *4.

106. N.Y. STATE POLICE & CONN. OFFICE OF THE ATTORNEY GENERAL, REPORT ON THE EVALUATION OF THE CONNECTICUT DEPARTMENT OF PUBLIC SAFETY INTERNAL AFFAIRS PROGRAM, at ii, vi, 132 (2006), www.ct.gov/ag/lib/ag/other/conn_report_12-04-06.pdf.

bias is the product of high-ranking officers seeking to protect their own reputation and department. Supervisors within the Connecticut State Police, for example, directed internal affairs investigators to ignore evidence, declined to follow up on investigative leads, and refused to open a case with strong evidence of misconduct unless the complaint could be proven beyond a reasonable doubt.[107] As a result, the internal affairs unit failed to investigate serious allegations, and officers who otherwise may have faced disciplinary action as severe as termination or even arrest retained their jobs without any consequences.[108]

D. *Investigations Are Particularly Reproachable in the Context of Excessive Force Complaints*

Police officers' use of excessive force is a frequent source of discord between police departments and the communities they serve.[109] Use of force is such a significant problem—and has been for so many years—that even some law enforcement officials are starting to call for mandatory reporting of all uses of force by police officers.[110] Unfortunately, even when police officers create those reports, they are typically reviewed pro forma if at all. When the DOJ investigated the Ferguson Police Department (FPD), it summarized the department's policies for reviewing officers' use of force as "particularly ineffectual," noting that supervisors assigned to review uses of force "do little to no investigation; either do not understand or choose not to follow FPD's use-of-force policy in analyzing officer conduct; rarely correct officer misconduct when they find it; and do not see the patterns of abuse that are evident when viewing these incidents in the aggregate."[111]

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107. *Id.* at iii, vi.

108. *Id.* at iii.

109. *See* Krogstad, *supra* note 52 (concluding that minorities are significantly less likely than whites to express confidence in the ability of the police to treat races equally and avoid excessive force).

110. *See* Charles A. Gruber & Wayne W. Schmidt, *Mandatory Nationwide Use of Force Reporting by Police and Correctional Agencies—and Why This is an Important Issue*, 6 AELE MO. L.J. 501, 504-06 (2015).

111. FERGUSON INVESTIGATION, *supra* note 33, at 38.

Even when the officers' reports themselves made clear that they violated the department's use of force policy—without even taking into account the civilians' side of the story—those officers were virtually never disciplined. Out of 151 incidents in which officers used force on civilians, supervisors and command staff approved all but one.[112] The Ferguson police chief himself admitted that he had never once overturned a supervisor's conclusion that use of force was reasonable.[113] The DOJ report concluded that "uses of force that violate the law or FPD policy are rarely detected and often ignored when they are discovered."[114]

Police departments across the country rubberstamp their officers' overuse of force against civilians. In Albuquerque, the DOJ found that police department supervisors very rarely scrutinized their officers' use of force, and instead found obviously excessive force to be "reasonable, [or] even exemplary."[115] In New Orleans, police officers "routinely disregarded" department policies regarding use of force, supervisors failed to investigate uses of force, and incidents involving "clearly unjustified force" were nonetheless approved by supervisors all the way up the department's chain of command.[116] Similarly, though the DOJ's review of officer-involved shootings within the New Orleans Police Department revealed "many" instances of "clear policy violations" over just a two-year period, the police department itself had not found an officer-involved shooting to violate policy in the last six years.[117] The DOJ investigation concluded that New Orleans police regularly "used force,

112. *Id.* at 39.

113. *Id.* at 41.

114. *Id.* at 16; *see also* FERGUSON COMM'N, FORWARD THROUGH FERGUSON: A PATH TOWARD RACIAL EQUALITY 27 (2015), http://3680or2khmk3bzkp33juiea1.wpengine.netdna-cdn.com/wp-content/uploads/2015/09/101415_FergusonCommissionReport.pdf (noting that civilians' distrust of Ferguson police officers was "compounded by the perception that when force is used, investigations into the use of force incident will be biased toward the law enforcement officer").

115. ALBUQUERQUE INVESTIGATION, *supra* note 62, at 23.

116. NEW ORLEANS INVESTIGATION, *supra* note 48, at vii.

117. *Id.* at vi, 18.

including deadly force, in a manner that plainly contradicted ... the Constitution" and endangered the lives of innocent civilians, but no one in the police department was held accountable.[118]

The same is true in Cleveland, where police department supervisors failed to thoroughly investigate allegations of excessive force, and instead conducted cursory investigations that "almost never found the force to be unreasonable," and were "designed from the outset to justify officers' actions."[119] Over a five-year span, the Newark, New Jersey Police Department did not discipline a single officer for using excessive force.[120] And in Seattle, the police department received 1,230 use of force reports between 2009 and 2011, and referred only five for further investigation into the possibility of officer misconduct.[121] An exposé of the review process there concluded that use of force reviews were little more than a formality, designed to automatically approve the officers' decisions to use force.[122]

Civilians' complaints regarding use of force are equally ignored. Between 2001 and 2007, the Camden, New Jersey Police Department received 485 complaints regarding excessive force, and the Internal Affairs Unit sustained only two.[123] The review process was so pointless that a federal district court concluded a jury could reasonably find the City of Camden had "a custom of performing inadequate investigations of citizen complaints of police

118. NEW ORLEANS INVESTIGATION, *supra* note 48, at 3. According to the United States Supreme Court, force is unconstitutionally excessive if it goes beyond what is "objectively reasonable in light of the facts and circumstances" known to the officer. Graham v. Connor, 490 U.S. 386, 397 (1989) (internal quotations omitted).

119. CLEVELAND INVESTIGATION, *supra* note 48, at 31.

120. NEWARK INVESTIGATION, *supra* note 49, at 42.

121. U.S. DEP'T OF JUSTICE, INVESTIGATION OF THE SEATTLE POLICE DEPARTMENT 4, 12 (2011), http://www.justice.gov/crt/about/spl/documents/spd_findletter_12-16-11.pdf [hereinafter SEATTLE INVESTIGATION].

122. *Id.* at 4, 19.

123. Noble v. City of Camden, 112 F. Supp. 3d 208, 217-18 (D.N.J. 2015).

brutality . . . which reflected an indifference to the allegedly excessive use of force by its officers."[124]

In Albuquerque, the Internal Affairs Unit identified less than one percent of officers' use of force incidents as unreasonable, while the DOJ reviewed the same reports and concluded that fully one-third of the incidents involved unreasonable force.[125] Even more disturbingly, Albuquerque police officers shot and killed twenty people between 2009 and 2012, and the DOJ found that the "majority" of those shootings were unjustified, including multiple cases in which officers shot and killed civilians who did not pose an immediate threat of death or serious bodily injury.[126] The DOJ concluded that the Albuquerque Police Department's approval of nearly every use of force indicated "a pervasive and deliberate leniency in supervisory oversight and accountability."[127]

A federal district court reached the same conclusion regarding the Philadelphia Police Department. The family of Billy Panas, a man murdered by Philadelphia police officer Frank Tepper, sued the police department, alleging that it had intentionally ignored "deeply troubling" use of excessive force by Officer Tepper.[128] The lawsuit alleged that Officer Tepper had pistol-whipped a citizen, physically attacked young boys who threw snowballs at his house, and lied about the incidents to the internal affairs officers.[129] Although the internal affairs investigators made note of Tepper's volatility on multiple occasions, and also expressed doubt that he was telling the truth about the incidents, they recommended no discipline, and the police department continued to give him positive reviews.[130] The district court held that a jury could reasonably find that Panas's death was foreseeable, given Officer Tepper's history of excessive force, and that the police

124. *Id.* at 224.

125. ALBUQUERQUE INVESTIGATION, *supra* note 62, at 16.

126. *Id.* at 2-3.

127. *Id.* at 16; *see also id.* at 24.

128. Panas v. City of Philadelphia, 871 F. Supp. 2d 370, 372, 379 (E.D. Pa. 2012).

129. *Id.* at 372-73.

130. *Id.* at 372-74.

department could have prevented Panas's death by disciplining or firing Tepper.[131]

The farcical nature of internal police review is perhaps most tellingly illustrated by police departments that allow supervisors to "investigate" and approve their own use of force.[132] Both the New Orleans and Albuquerque police departments, for example, have allowed supervisors who personally used force against civilians to lead the investigation into and review complaints regarding their own use of force.[133] Until recently, the Santa Maria Police Department allowed the same officers who were accused of using force against arrestees to then interview the arrestees about those incidents.[134] And in multiple officer-involved shooting investigations in the Albuquerque Police Department, other officers who were involved in the incident were allowed to participate in the shooting officer's interview, which encourages collaboration in recounting how the incident occurred.[135] This practice—allowing the very people who have been accused of using force to determine whether that force was reasonable—brings to mind an old African proverb: "Corn can't expect justice from a court composed of chickens."[136] A civilian complaining about an officer's misconduct cannot expect justice to emanate from the very officer he accused.

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131. *Id.* at 379.

132. *See* FERGUSON INVESTIGATION, *supra* note 33, at 40.

133. NEW ORLEANS INVESTIGATION, *supra* note 48, at 17-18; ALBUQUERQUE INVESTIGATION, *supra* note 62, at 33-34.

134. Michael Gennaco et al., *supra* note 95, at 7.

135. ALBUQUERQUE INVESTIGATION, *supra* note 62, at 28.

136. The first person to coin this proverb is unknown, but it is most commonly used in Nigeria. *Roof Garden Wall—Right Center Panel,* HARVARD LAW SCH. LIBR.: WORDS OF JUST., http://library.law.harvard.edu/justicequotes/explore-the-room/south-3 (last visited May 27, 2016). A similar proverb, attributed to an anonymous Ghanaian, is: "The chicken is never declared innocent in the court of hawks." *Id.*

E. *Internal Affairs Units Routinely Resist Requiring Serious Discipline for Serious Misconduct*

Police departments' resistance to disciplining their own officers extends to even the most obvious misconduct. A report on the Portland, Oregon Police Department found that the Internal Affairs Division sustained "very few" civilian complaints of any sort, and filing complaints against miscreant officers was futile because the department would simply not discipline them.[137] One of the most disturbing revelations to come out of the Ferguson investigation was evidence that Ferguson police officers sent numerous racially discriminatory emails to each other, stereotyping minorities as lazy, unemployed, living off welfare, and prone to committing crimes.[138] Not one of the officers receiving these emails ever reported them as inappropriate, and many forwarded them on to other people.[139]

The Seattle Police Department has also had a number of incidents in which police officers used racial slurs against minorities, including one in which an officer was recorded threatening to "beat the f'ing Mexican piss out of a suspect."[140] Although multiple officers at the scene witnessed this incident, none reported it, and the police department did not discipline the officer until a civilian bystander made public a video of the incident.[141] On other occasions, Seattle police officers reportedly called a Native American man a "f'ing Indian," and derisively suggested that a black man who worked at a hospital must be "the janitor."[142] Despite complaints by civilians who overheard the incidents, the police department declined to discipline these officers.[143]

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137. EILEEN LUNA-FIREBAUGH, PERFORMANCE REVIEW OF THE INDEPENDENT POLICE REVIEW DIVISION 63 (2008), http://www.portlandonline.com/auditor/index.cfm?a=245276&c=44653.

138. *See* FERGUSON INVESTIGATION, *supra* note 33, at 71-72.

139. *Id.* at 72.

140. SEATTLE INVESTIGATION, *supra* note 121, at 27.

141. *Id.*

142. *Id.* at 28.

143. *Id.* at 27-28.

Police departments are also unwilling to refer cases involving their own officers' misconduct to the local prosecutor's office for potential criminal charges. The DOJ investigation into the Newark Police Department revealed "multiple instances in which credible complaints of potentially criminal uses of force were not referred to prosecutors for review, even though by any objective measure they should have been," and concluded that the department "often fails" to refer use of force cases to the prosecutor's office.[144] Similarly, the DOJ report regarding the New Orleans Police Department concluded that criminal misconduct by officers was inadequately investigated and too rarely prosecuted.[145] The police department also offered its investigators no guidance on when or how to contact a prosecutor when an investigation revealed criminal conduct; in practice that meant that the investigators declined to contact the prosecutor at all.[146] One possible explanation for this extreme reluctance to refer officers for prosecution is the political firestorm that can result: few police chiefs, many of whom are elected officials, are willing to endure the groundswell of criticism that results within and outside the police department's ranks when the department admits one of its officers engaged in criminal conduct.[147]

Nearly twenty years ago in the landmark civil rights lawsuit *Beck v. City of Pittsburgh*, the Third Circuit Court of Appeals lamented the inadequacies of internal review, mourning that it was:

> not enough that an investigative process be in place . . . [t]he investigative process must be real. It must have some teeth. It must answer to the citizen by providing at least a rudimentary chance of

144. NEWARK INVESTIGATION, *supra* note 49, at 25, 28.

145. NEW ORLEANS INVESTIGATION, *supra* note 48, at xvii-xviii.

146. *Id.* at 94.

147. *Compare*, The Times Editorial Board, *Chief Beck's Call For Prosecution*, L.A. TIMES (Jan. 12, 2016), http://www.latimes.com/opinion/editorials/la-ed-lapd-shooting-20160111-story.html, *with* Los Angeles Police Protective League, *Why Chief Beck Failed Us*, POLICE MAG. (Jan. 15, 2016), http://www.policemag.com/blog/patrol-tactics/story/2016/01/why-chief-beck-failed-us.aspx (taking contrasting viewpoints on LAPD Chief Beck's decision to recommend criminal charges in LAPD officer's shooting of Brendon Glenn, an unarmed black man).

> redress when injustice is done. The mere fact of investigation for the sake of investigation does not fulfill a city's obligation to its citizens.[148]

Those words ring equally true today. For too many internal affairs units, the investigative process is nugatory and toothless. It makes a mockery of the complaint process by masquerading as a means of redress while perpetuating injustice.

III. THE FLAWS OF EXISTING INDEPENDENT REVIEW

Independent review agencies are not a new creation: they first cropped up during the Civil Rights movement of the 1950s and 1960s, after activists, mostly from African American communities, began demanding that outside agencies investigate the blatant abuses police officers were inflicting on black communities.[149] The most basic premise of independent review—also referred to as civilian oversight—is simply that someone other than a police officer is responsible for reviewing complaints alleging police misconduct.[150]

Independent review agencies exist in many forms.[151] Some act as in-house additions to the review process; in this model, civilian employees serve alongside the internal affairs unit within a police department. Other independent review models are strictly external, conducting independent investigations of police misconduct allegations, and typically

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148. Beck v. City of Pittsburgh, 89 F.3d 966, 974 (3d Cir. 1996); *see also* Merman v. City of Camden, 824 F. Supp. 2d 581 (D.N.J. 2010) (detailing citizen complaints of a pattern of excess force by Camden, New Jersey police officers, and finding a question of fact over whether the Camden Police Department has a pattern and practice of allowing such force).

149. Samuel Walker & Morgan Macdonald, *An Alternative Remedy for Police Misconduct: A Model State "Pattern or Practice" Statute*, 19 GEO. MASON U. C.R. L.J. 479, 498-99 (2009).

150. *See, e.g.*, Sean Hecker, *Race and Pretextual Traffic Stops: An Expanded Role for Civilian Review Boards*, 28 COLUM. HUM. RTS. L. REV. 551, 593 (1997).

151. For a more thorough discussion about the varieties of civilian oversight, *see generally, e.g.*, SAMUEL WALKER, POLICE ACCOUNTABILITY: THE ROLE OF CIVILIAN OVERSIGHT (2001); Samuel Walker, *Alternative Models of Citizen Oversight*, *in* CITIZEN OVERSIGHT OF LAW ENFORCEMENT 11 (Justina Cintón Perino ed., 2006).

recommending discipline if the situation warrants. A third common form of independent review is the auditor model, in which designated civilian auditors review the decisions of internal affairs units after investigations have concluded, and make recommendations for improvements in future investigations.[152]

Although independent review agencies take many forms, a shared characteristic of nearly all is that they have not done enough to reduce police misconduct. Even proponents of independent review agencies admit that they are often "'weak, ineffective, poorly led,' and have had no measurable impact on police misconduct."[153] The shortcomings of one prominent independent review agency—New York's Civilian Complaint Review Board—were recently highlighted after a widely-publicized incident in which Officer James Frascatore of the New York Police Department tackled and handcuffed tennis star James Blake, a biracial man whom Frascatore allegedly mistook for an identity theft suspect.[154] Blake, who unlike most victims of police misconduct enjoys sufficient celebrity to attract media attention to his plight, immediately took to the press to denounce Officer Frascatore's unjustified use of force.[155] A subsequent investigation revealed that at least three other black men had filed complaints against Officer Frascatore between 2012 and 2013, alleging that he had assaulted and physically attacked them without provocation, punched one man repeatedly in the face, knocked another man to the ground, and used racial slurs in

152. The National Association for Civilian Oversight of Law Enforcement Agencies (NACOLE) has an extensive list of and links to civilian oversight agencies in the United States. *See Police Oversight by Jurisdiction (USA)*, NAT'L ASS'N FOR CIVILIAN OVERSIGHT OF LAW ENFORCEMENT, http://www.nacole.org/police_oversight_by_jurisdiction_usa (last visited May 26, 2016).

153. Simmons, *supra* note 96, at 504 (citation omitted).

154. *See* Benjamin Mueller & Nate Schweber, *Officer Who Arrested James Blake Has History of Force Complaints*, N.Y. TIMES (Sept. 11, 2015), http://www.nytimes.com/2015/09/12/nyregion/video-captures-new-york-officer-manhandling-tennis-star-during-arrest.html?smid=tw-nytimes&smtyp=cur&_r=1.

155. *Id.*

at least one of the attacks.[156] Although all of these complaints had been reported to the Civilian Complaint Review Board, they had not resulted in any discipline for Officer Frascatore.[157]

New York's Civilian Complaint Review Board is hardly the only independent review agency that has been on the receiving end of extensive, and deserving, criticism. A 2008 review of the Portland Independent Police Review reported that only twenty to thirty percent of surveyed citizens were satisfied with the agency, and concluded that the agency "does not have the confidence of the community."[158] In 2015, Chicago's Independent Police Review Authority came under scathing criticism for hiring a controversial psychologist, best known for testifying in favor of police officers in shooting cases, to train its investigators.[159] Independent review agencies struggle from a number of deficiencies in both staffing and structure, including understaffing, overly cozy relationships with police departments (or, conversely, poor cooperation from police departments), insufficient authority, and unwillingness to take politically unpopular positions.

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156. *Id.*; Associated Press, *Officer Who Arrested James Blake Has Two Civil Rights Suits Against Him*, ESPN (Sept. 12, 2015), http://www.espn.com/espnw/news-commentary/article/13630856/officer-james-blake-arrest-history-excessive-force-allegations; Daniel Beekman, *Queens Man Sues Over Bogus Arrest That Began with NYPD Cops Pepper-spraying Him Repeatedly—While on Video*, NY DAILY NEWS (Apr. 14, 2014), http://www.nydailynews.com/new-york/queens/queens-man-sues-pepper-spray-abuse-cops-article-1.1755374; Ben Brumfield, *Before Tackling James Blake, Police Officer Had Complaints of Brutality*, CNN (Sept. 14, 2015), http://www.cnn.com/2015/09/14/us/james-blake-tackled-officer.

157. *Id.* The Civilian Complaint Review Board has since sustained a finding against Officer Frascatore for misconduct in his arrest of Blake, and recommended discipline of either suspension or termination. *See* J. David Goodman, *Officer in James Blake Arrest Used Excessive Force, Panel Says*, N.Y. TIMES (Oct. 7, 2015), http://www.nytimes.com/2015/10/08/nyregion/officer-in-james-blake-arrest-used-excessive-force-panel-says.html?_r=0.

158. LUNA-FIREBAUGH, *supra* note 137, at 9.

159. *See, e.g.*, Chip Mitchell, *City Sends Police-Shooting Investigators to Trainer Accused of Pro-Cop Bias*, WBEZ NEWS (Sept. 28, 2015), http://www.wbez.org/news/city-sends-police-shooting-investigators-trainer-accused-pro-cop-bias-113077.

A. *Many Independent Review Agencies Are Inadequately Staffed So That Meaningful Investigations Are Virtually Impossible*

Some independent review agencies are staffed entirely by volunteers, many of whom have very limited review powers. Baltimore, for example, occasionally convenes an Independent Review Board in response to specific incidents, such as a 2011 shooting in which police officers killed an off-duty officer and a civilian, and the 2013 death of Tyrone West, an African American man whom the police were restraining at the time he died.[160] The board relies entirely on volunteers serving on a part-time basis, and receives no funding from the city.[161] In contrast, the city of Tampa, Florida has a permanent review board, but it is also staffed entirely by volunteer members who review only "completed disciplinary cases" rather than ongoing investigations, and make only recommendations to the police chief for improvement in future cases.[162] Although the two boards are structured differently, both struggle to create any real change: their members are limited in both their opportunity to investigate in a prompt manner, and their ability to influence police departments and government officials.

Understaffing often prevents timely responses to misconduct complaints, even in cities with independent review agencies run by full-time, paid employees. In New

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160. BALTIMORE POLICE DEPARTMENT, INDEPENDENT REVIEW BOARD FOLLOW-UP RESPONSE 1 (2012), http://www.baltimorepolice.org/sites/default/files/IRB_BPD_Final_v2.pdf [hereinafter FOLLOW-UP RESPONSE]; IN-CUSTODY FATALITY INDEP. REVIEW BD. FOR THE DEATH OF TYRONE WEST, FINDINGS AND RECOMMENDATIONS 1-2 (2014), http://www.wbaltv.com/blob/view/-/27381810/data/1/-/wnk60uz/-/Tyrone-West-death-police-report.pdf [hereinafter DEATH OF TYRONE WEST].

161. DEATH OF TYRONE WEST, *supra* note 160, at 1-2. Baltimore also has a more permanent Civilian Review Board tasked with processing and investigating complaints regarding abusive language, harassment, or excessive force by police officers. *See Civilian Review Board, General Rules*, CITY OF BALTIMORE, http://archive.baltimorecity.gov/Government/BoardsandCommissions/OfficeofCivilRightsandWageEnforcement/CivilianReviewBoard/Rules.aspx (last visited May 26, 2016).

162. *Citizens Review Board*, CITY OF TAMPA, http://www.tampagov.net/city-clerk/citizens-review-board (last visited May 26, 2016).

York City, the Citizen Complaint Review Board's docket is unmanageably large compared to the number of investigators; the Review Board has historically taken nearly a year to resolve the average citizen complaint, and significantly longer on the rare occasions it sustains a complaint.[163] A startlingly high percentage of independent review agencies also do not have their own investigators and are forced to rely on internal affairs officers to handle the investigations into all alleged misconduct. Scripps News recently surveyed more than 200 civilian oversight agencies across the United States, and nearly two-thirds reported that they do not have their own investigators.[164]

B. *Some Independent Review Agencies Are Inherently Biased in Favor of the Police*

Independent review agencies are often staffed by former police officers, prosecutors, or members of the law enforcement community, on the theory that these people have the greatest expertise in assessing whether a police officer's actions were appropriate. Unfortunately, this composition presents a dilemma similar to that inherent in internal review: the people reviewing the police often have a closer relationship with the police department than with the civilian community they are intended to serve.

This problem is prevalent in many independent review agencies. As noted above, Chicago's Independent Police Review Authority, which is staffed primarily by former law enforcement officers, recently came under fire for hiring a psychologist—known primarily for his unwavering defense of police officers who shoot civilians—to train its investigators.[165] One of the investigators was quoted as saying that the psychologist's training gave him "a better

163. NYC CIVILIAN COMPLAINT REVIEW BD., ANNUAL REPORT, at ix-x, 1 (2014), http://www.nyc.gov/html/ccrb/downloads/pdf/2014-annual-report-rev2layout.pdf.

164. Ross Jones, *Many Civilian Review Groups Have Limited Power to Resolve Allegations of Police Misconduct*, SCRIPPS NEWS (Nov. 16, 2015, 11:14 AM), http://www.wptv.com/news/national/many-civilian-review-groups-lack-the-power-to-resolve-allegations-of-police-misconduct.

165. Mitchell, *supra* note 159.

way to articulate why the [police] shootings are almost always justified."[166] The former chief of the Independent Police Review Authority, who resigned in December of 2015 after the Laquan McDonald shooting scandal, also fired one of the agency's investigators, an African American man who had determined that several Chicago police shootings were unjustified and refused agency pressure to change his findings.[167] As of 2015, the Independent Police Review Authority had investigated nearly 400 officer-involved shootings, and found only one to be unjustified.[168]

Concerns over biased review agencies extend across the country. Los Angeles terminated its contract with the Office of Independent Review—a civilian oversight group that monitored investigations of alleged misconduct in the Los Angeles Sheriff's Department—in 2014, amidst allegations that the review office was too closely partnered with the Sheriff's Department, and concerns over the office's ability to provide effective oversight.[169] The Office of Independent Review was housed within the Sheriff's Department and served in many ways as an advisory counsel to the Sheriff, rather than an oversight body.[170] Similarly, the DOJ investigation into the Albuquerque Police Department concluded that, although the City had retained an independent review officer to investigate allegations of police misconduct, the review officer was essentially useless because she aligned herself more closely with the department than the civilians whose complaints she was hired to

166. *Id.*

167. Chip Mitchell, *City Fires Investigator Who Found Cops at Fault in Shooting*, WBEZ (July 20, 2015), http://www.wbez.org/news/city-fires-investigator-who-found-cops-fault-shootings-112423.

168. *Id.*

169. *Office of Independent Review*, L.A. CTY. SHERIFF'S DEP'T, http://shq.lasdnews.net/shq/LASD_Oversight/oversight_documents.html (last visited May 26, 2016); *see also, e.g.*, Christina Villacorte, *Inspector General: End L.A. County Contracts with Office of Independent Review*, L.A. DAILY NEWS (Mar. 18, 2014, 8:05 PM), http://www.dailynews.com/government-and-politics/20140318/inspector-general-end-la-county-contracts-with-office-of-independent-review-special-counsel-merrick-bobb.

170. Villacorte, *supra* note 169.

investigate.[171] The review officer had failed to acknowledge when departmental policy violations likely occurred, interpreted the police department's policies in ways contrary to the policies' language, and been "too forgiving of the department's use of deadly force."[172]

Seattle's Office of Professional Affairs, which is part of the Seattle Police Department but has a civilian director, has also been criticized for frequently deferring to the police department's judgment concerning when and how to investigate allegations of officer misconduct.[173] Although the Office of Professional Affairs is intended to serve as an impartial investigative body, it for years disposed of most citizen complaints by sending them to Seattle police precincts for internal review, even when the complaints involved serious allegations like excessive force or discriminatory policing.[174] The quality of these investigations was, according to one Office of Professional Affairs staff member, "appalling."[175] Similarly, although Cleveland has a civilian Police Review Board that can be called in to review police misconduct, the board typically gets involved only after the internal police investigation has already been completed.[176] The Board relies almost exclusively on the police department's findings; although it has subpoena power and is authorized to compel the police department to disclose investigative information, it rarely does so.[177] As a result of the Review Board's lackadaisical approach to investigation, the DOJ concluded in 2014 that the Review Board played virtually no meaningful role in investigation.[178]

171. ALBUQUERQUE INVESTIGATION, *supra* note 62, at 39.

172. *Id.*

173. *See* SEATTLE INVESTIGATION, *supra* note 121, at 5, 7-8.

174. *Id.* at 5.

175. *Id.*

176. CLEVELAND INVESTIGATION, supra note 48, at 41-42.

177. *Id.*

178. *Id.*

C. *On the Other Extreme, Some Independent Review Agencies Have Hostile Relationships with the Police and No Authority to Demand Access to Police Officers or Files*

Although independent review agencies comprised primarily of former law enforcement officials pose a serious risk of bias in favor of the police, others suffer from the opposite problem: police departments that are overtly hostile and actively stymie the review agencies' efforts to investigate misconduct allegations. For example, although the Philadelphia Police Advisory Commission exists to provide independent civilian oversight of police operations, the Philadelphia Police Department often refuses to disclose investigative files or complaints, and the Commission cannot access information critical to its investigations.[179] In Washington, D.C., the Office of Police Complaints—the civilian oversight agency tasked with investigating police misconduct—reported that more than one-third of the police officers it investigated refused to cooperate with investigators, and the review agency could not require them to do so.[180]

Hostility from the police could be overcome if the review agency was able to demand access to necessary police files or witnesses, but that is often not the case. Many independent review agencies lack even subpoena power, and cannot require police departments to provide information necessary to review claims.[181] Additionally, about one-half of states

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179. GEORGE FACHNER & STEVEN CARTER, COLLABORATIVE REFORM INITIATIVE: AN ASSESSMENT OF DEADLY FORCE IN THE PHILADELPHIA POLICE DEPARTMENT 119 (2015), http://ric-zai-inc.com/Publications/cops-w0753-pub.pdf.

180. GOV'T OF D.C., POLICE COMPLAINTS BD., OFFICE OF POLICE COMPLAINTS: ANNUAL REPORT 24-25 (2012), https://assets.documentcloud.org/documents/608268/office-of-police-complaints-annual-report.pdf; *see also* Peter Hermann, *D.C. Civilian Police Oversight Board Concerned As Lanier Overrules Decisions*, WASH. POST (Feb. 27, 2013), https://www.washingtonpost.com/local/dc-civilian-police-oversight-board-concerned-as-lanier-overrules-decisions/2013/02/27/34e55944-800c-11e2-8074-b26a871b165a_story.html.

181. DEATH OF TYRONE WEST, *supra* note 160, at 1; FOLLOW-UP RESPONSE, *supra* note 160, at 1; David Porter, *Newark OKs Strong Police Review Board; Union Vows Fight*, ASSOCIATED PRESS (Mar. 16, 2016, 8:43 PM),

across the United States, as well as many cities, have laws that heavily favor police officers against those seeking information about the officers, and prevent disclosure of disciplinary records or complaints filed against those officers except in rare circumstances.[182] Although some review agencies are specifically exempted from these privacy laws, others are forced to rely only on what sparse records the police departments consent to disclose.

Other review agencies may not even know what complaints are being reported, because the review agency itself is not the designated recipient of all civilian complaints. In Seattle, for example, the Office of Professional Authority tracks complaints that civilians make directly to its office, but has no ability to track complaints made to individual police officers, police precincts, or the City itself. The Seattle Police Department has for years routinely failed to refer civilian complaints to the Office of Professional Authority, which results in a civilian oversight agency unable to investigate even serious complaints like excessive force.[183] And over a two-year period from 2011 to 2013, the Denver Sheriff's Department notified the Office of the Independent Monitor about only nineteen percent of serious grievances that inmates filed.[184] Where the Independent Monitor was not

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http://bigstory.ap.org/article/a4867d7361a24653ab5a3bc13e727d2a/newark-ok-strong-police-review-board-union-vows-fight.

182. For a few examples of these laws, *see, e.g.*, N.Y. CIV. RIGHTS LAW §50-A (McKinney 2016) (preventing disclosure of police records except by court order); AURORA, COLO., MUN. CODE § 50-41 (placing strict limitations on disclosure of police records even when deemed relevant to criminal proceedings); Copley Press, Inc. v. Superior Court, 141 P.3d 288 (Cal. 2006) (holding that police personnel records are confidential under state law); Md. Dep't of State Police v. Dashiell, 117 A.3d 1 (Md. 2015) (holding that internal affairs investigatory records are exempt from disclosure); *see also* Jonathan Abel, Brady's *Blind Spot: Impeachment Evidence in Police Personnel Files and the Battle Splitting the Prosecution Team*, 67 STAN. L. REV. 743 (2015) (discussing how various state and city laws hamper disclosure of police personnel records in criminal cases); David Packman, *Police Misconduct Disclosure Laws*, CATO INSTITUTE (Feb. 7, 2010), http://www.policemisconduct.net/police-misconduct-disclosure-laws/ (providing summary of police misconduct disclosure laws in all fifty states).

183. SEATTLE INVESTIGATION, *supra* note 121, at app. D2.

184. DENVER OFFICE OF THE INDEP. MONITOR, *supra*, note 87 at 19.

even told about eighty-one percent of the most serious grievances, it had no way of investigating those complaints.

D. *A Large Percentage of Complaints That Independent Review Agencies Receive Are Never Meaningfully Resolved*

A startlingly low percentage of complaints made to independent review agencies are ever resolved with a finding that the alleged misconduct did or did not occur. The problem arises in part because of the unnecessary obstacles imposed on civilians attempting to report misconduct, which result in a high percentage of complaints being turned away at the proverbial (or actual) door. Albuquerque's Police Review Commission, for example, is required by ordinance to reject a complaint unless it is personally signed by the complainant, nor can it accept a complaint that is reported more than ninety days after the alleged misconduct.[185] As a result, a large number of complaints are rejected without even a cursory investigation. In Chicago, the Independent Police Review Authority requires a signed, sworn affidavit from almost every complainant, and will not move forward with the investigation unless it receives that affidavit.[186] In 2012, the Independent Police Review Authority and the Chicago Police Department's Board of Internal Affairs collectively closed more than forty percent of all complaints simply because they did not obtain the requisite affidavit.[187]

When agencies do investigate complaints, the investigations still may not result in any meaningful

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185. ALBUQUERQUE INVESTIGATION, *supra* note 62, at 38-39.

186. RON SAFER ET AL., PREVENTING AND DISCIPLINING POLICE MISCONDUCT: AN INDEPENDENT REVIEW AND RECOMMENDATIONS CONCERNING CHICAGO'S POLICE DISCIPLINARY SYSTEM 13 n.3, (2014), http://www.cityofchicago.org/content/dam/city/progs/safety/Preventing_Disciplining_Police_Misconduct_Dec_2014.pdf; *File a Complaint*, INDEP. POLICE REVIEW AUTHORITY, http://iprachicago.org/howtofile.html (last visited May 26, 2016) ("State law requires that any person making an allegation of misconduct against a Chicago police officer sign a sworn affidavit that certifies that the allegation is true and correct.").

187. SAFER ET AL., *supra* note 186, at 48; *see also* GORDON WALDRON, PROCESSING COMPLAINTS AGAINST CHICAGO POLICE OFFICERS 4 tbl.3 (2015) (source on file with the author).

resolution. In 2014, New York City's Citizen Complaint Review Board closed out nearly one-half of its cases with a finding of "unsubstantiated," which means that the Board did not determine whether the complaint had merit or not.[188] In the same year, Chicago's Independent Police Review Authority closed out fifty-four percent of its investigations as "not sustained," meaning that the agency decided it did not have sufficient evidence to determine whether the complaint was true or false.[189] Between 2008 and 2012, the agency closed out seventy-one percent of its cases with a "not sustained" finding.[190] Because most agencies are not required to report the reasons behind their findings, it is impossible to say exactly why these numbers are so high. But when a complaint is not sustained, no one is vindicated: not the officer accused, not the civilian who filed the complaint, and not the community hoping for a reason to believe that the review process actually works.

Yet another factor contributing to extreme delays in resolving—or simply inability to resolve—citizen complaints is that the independent review agency is sometimes just one of several agencies involved in the review process. In Chicago, the Independent Police Review Authority processes the initial intake of all complaints, but depending on the type of misconduct alleged, it is just one of three agencies that may be involved in the review process.[191] Misconduct investigations often drag on for years, and if the Review Authority eventually does recommend discipline, it takes even longer to implement because of the myriad of grievance and appeals opportunities available to the officers.[192] Such extreme delays in resolving complaints may cause citizens to

188. N.Y.C. CIVILIAN COMPLAINT REVIEW BD., ANNUAL REPORT 27 (2014), http://www.nyc.gov/html/ccrb/downloads/pdf/2014-annual-report-rev2layout.pdf.

189. WALDRON, *supra* note 187, at 5, tbl. 5.

190. *Id.* at 10. As low as these numbers may seem, they are a significant improvement over the absolutely abysmal rate of sustained investigations before the Independent Police Review Authority was established. For a statistical analysis of these stunningly low rates, see Craig B. Futterman et al., *The Use of Statistical Evidence to Address Police Supervisory and Disciplinary Practices: The Chicago Police Department's Broken System*, 1 DEPAUL J. FOR SOC. JUST. 251, 267 tbl.1 (2008).

191. *See* SAFER ET AL., *supra* note 186, at 1.

192. *Id.* at 7.

believe that the agency is ineffectual, or worse, simply ignoring their complaints.

E. *Independent Review Agencies Almost Universally Lack Authority to Impose Discipline*

Perhaps the most common complaint about independent review agencies is that they lack the authority to create meaningful change. Sometimes this stems from the agency's inability to investigate certain types of claims: for example, despite complaints that New York Police Department officers have a long history of making false statements in police reports or to investigative bodies, the Citizen Complaint Review Board is not authorized to investigate false statement cases; complaints about false statements are automatically referred to the Internal Affairs Unit.[193]

More typically, however, the problem is that independent review agencies are—with very few exceptions—not authorized to require or impose discipline. Some agencies, like the Cleveland Police Review Board, play no role whatsoever in the disciplinary process.[194] But most simply have the ability to recommend discipline, which the police chief is then free to accept or reject. The setup in St. Louis County, Missouri, is typical of this approach; there, a civilian Board of Police Commissioners reviews certain types of misconduct allegations and makes recommendations on discipline, but the chief of police remains the final authority on whether to impose that discipline.[195] New York City's Civilian Complaint Review Board also does not have any disciplinary authority; instead, it simply forwards its findings to the police commissioner, who frequently

193. N.Y.C. CIVILIAN COMPLAINT REVIEW BD., *supra* note 188, at x-xi, 39-45.

194. CLEVELAND INVESTIGATION, *supra* note 48, at 41.

195. BLAKE NORTON ET AL., COLLABORATIVE REFORM INITIATIVE: AN ASSESSMENT OF THE ST. LOUIS COUNTY POLICE DEPARTMENT 98 (2015), http://ric-zai-inc.com/Publications/cops-p316-pub.pdf. Another example of this approach is the Albuquerque civilian oversight structure, where the Police Oversight Commission makes recommendations on both misconduct findings and discipline, but the police chief retains complete discretion over the ultimate decision of whether misconduct occurred and, if so, what discipline is appropriate. *See* ALBUQUERQUE INVESTIGATION, *supra* note 62, at 38.

disregards the Review Board's recommendations.[196] As of 2014, the Civilian Complaint Review Board reported that the Police Department had declined to impose any discipline in fully one-quarter of cases in which the Review Board found misconduct and recommended discipline.[197]

Chicago's Independent Police Review Authority in theory has more power to enforce discipline, but in practice serves mostly as an example of bureaucracy getting in the way of real change. When the Independent Police Review Authority sustains a finding of misconduct against a police officer, it recommends discipline to the superintendent of police.[198] The recommended discipline goes through an extensive review process within the police department, during which supervisors in the accused officer's chain of command have an opportunity to concur or disagree with the recommended discipline before the case is passed on to the superintendent.[199] The superintendent then has ninety days to respond.[200] If the superintendent disagrees with the Review Authority's recommendation, the case is referred to a separate three-person Police Board, which reviews the case and decides whether the superintendent is justified in departing from the Review Authority's recommendation.[201] Even the Police Board's decision is not final and can be overridden if the officer chooses to appeal.[202] In 2012, the average complaint filed with the Review Authority took nearly three years to reach a final disposition because so

196. *See* N.Y.C. CIVILIAN COMPLAINT REVIEW BD., *supra* note 188, at 6; N.Y.C. Civilian Complaint Review Bd., *About CCRB*, CITY OF NEW YORK, http://www.nyc.gov/html/ccrb/html/about/about.shtml (last visited May 26, 2016); N.Y.C. Civilian Complaint Review Bd., *APU and Police Discipline*, CITY OF NEW YORK, http://www.nyc.gov/html/ccrb/html/police/police.shtml (last visited May 26, 2016).

197. N.Y.C. CIVILIAN COMPLAINT REVIEW BD., *supra* note 188, at 6.

198. SAFER ET AL., *supra* note 186, at 14.

199. *Id. See also* WALDRON, *supra* note 187, at 8.

200. SAFER ET AL., *supra* note 186, at 14.

201. CHI., ILL., MUN. CODE ch. 2-57-60 (2007); SAFER ET AL., *supra* note 186, at 14; WALDRON, *supra* note 187, at 8.

202. SAFER ET AL., *supra* note 186, at 15.

many agencies are involved in the review process and officers have so many options for appeal.[203]

F. *When Independent Review Agencies Do Recommend Discipline, It Is Typically Very Minor*

Even on the relatively rare occasions that an independent review agency sustains a misconduct complaint and recommends discipline, the discipline is often so negligible that it stands little chance of operating as an impetus for change. When Chicago's Independent Review Authority recently found that numerous police officers had racially discriminated against civilians—by using words the agency euphemistically described as "racially biased language," "racial comments," "racially offensive comments," and "ethnically biased language"—the Review Authority recommended minor suspensions of no more than a few days for each officer.[204] It is difficult to envision another professional setting in which an employee would be allowed to use racial slurs against a customer and even retain his job,[205] let alone escape with a brief suspension and no other discipline. Yet in policing, a profession which already shoulders the shame of decades of discrimination against

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203. *Id.* at 15-16.

204. *See* CITY OF CHI. INDEP. POLICE REVIEW AUTH., QUARTERLY REPORT APRIL 1, 2015–JUNE 30, 2015, at Abstracts of Sustained Cases C.R. Nos. 1052025, 1050270, 1060197, 1068340, 1066452, http://www.iprachicago.org/wp-content/uploads/2016/07/2015-07-15QuarterlyReport.pdf. The report does not provide any specific descriptions of the racially offensive language that the officers used. *Id.*

205. *See, e.g.*, Eric B. Meyer, *Intern Fired for Racist Tweet*, EMPLOYER HANDBOOK (Oct. 29, 2015), http://www.theemployerhandbook.com/2015/10/intern-fired-for-using-racial-slur-on-twitter-keeps-digging-the-hole-deeper.html; *Oregon Man Fired After Yelling Hispanic Slurs . . . at Arab Woman*, RT QUESTION MORE (Jan. 6, 2016), https://www.rt.com/usa/328327-oregon-man-racial-slurs-video (describing the story of a plumber in Oregon who was fired after yelling racial slurs at an Arab woman); Khushbu Shah, *Wendy's Employees Fired for Leaving Racist Note in 7-Year-Old's Meal*, EATER (Oct. 16, 2015), http://www.eater.com/2015/10/16/9552435/two-wendys-employees-fired-racist-note-kids-meal-colorado (describing how a Wendy's employee was fired for using a racial slur with a customer).

racial minorities,[206] the response to openly biased officers is still little more than a gentle chiding.

Vague suggestions about possible discipline are as ineffectual as inadequate discipline. In 2013, Denver's Office of the Independent Monitor issued a report finding that, over the past two years, almost one in six complaints that inmates had filed against the Denver Sheriff's Department involved just four deputies, from a staff of over 700 officers.[207] In the face of this startling statistic, the Independent Monitor made only one recommendation: that "these officers, or the jail areas to which they are assigned, may require more active supervision by jail administrators."[208] When less than 0.6 percent of the department's officers are responsible for more than 15 percent of misconduct complaints, that should trigger a response more forceful than a recommendation for "more active supervision."[209] Independent review agencies serve little purpose if they do not have the courage or authority to make more than mealy-mouthed recommendations in response to major problems.

IV. THE FIX: ELEMENTS OF AN EFFECTIVE REVIEW AGENCY

At the turn of the twenty-first century, the U.S. Commission on Civil Rights released a report on the status of police reform in the United States, commenting that complaints of police misconduct "seem to be incessant, and they typically prompt a complex series of responses: community leaders cry out for change; law enforcement agencies assert that they are doing their job; federal investigators evaluate rogue police officers and entire departments; politicians debate about policies that purport to be tough on crime, yet strong on civil rights."[210] The report concluded that, in the face of seemingly endless outcry over abusive police tactics, the nation desperately needed a

206. *See supra* Part I.

207. DENVER OFFICE OF THE INDEP. MONITOR, *supra* note 87, at 3.

208. *Id.*

209. *Id.*

210. U.S. COMM'N ON CIVIL RIGHTS, Executive Summary, *supra* note 54.

"reasoned, systematic approach to honestly and sufficiently address police misconduct, once and for all."[211]

Fifteen years later, the United States has yet to solve the police misconduct crisis. Politicians continue to debate policing policies, the federal government continues to investigate police departments, and community leaders continue to cry out for change.[212] Cities across the country are dealing with civilian populations increasingly disenchanted with and disenfranchised from their local police departments.

The failures of existing review systems have much to do with this growing disgust.[213] As the DOJ reported after its investigation of the Albuquerque Police Department, "failure to take meaningful remedial action . . . promotes a culture of unjustifiable aggression that further alienates the department from the communities it serves."[214] This alienation is not the fault of just a few rogue officers engaging in misconduct, although certainly they are part of the problem. The institutional culture within police departments, which has been so willing for so long to tolerate misconduct, must change.[215]

The remainder of this Article is an effort to move cities toward creating the meaningful institutional change that is so desperately needed, by identifying the core components, staff, and structure of an effective independent review agency.

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211. *Id.*

212. *See, e.g.*, sources cited *supra* note 21.

213. *See, e.g.*, SEATTLE INVESTIGATION, *supra* note 121, at 21.

214. ALBUQUERQUE INVESTIGATION, *supra* note 62, at 4; *see also* NEW ORLEANS INVESTIGATION, *supra* note 48, at xviii (concluding that as a result of inadequate investigations and responses to officer misconduct, police departments have little legitimacy in the communities they are intended to serve).

215. Simmons, *supra* note 35, at 366.

A. *Independent Review Agencies Should Be Staffed By Full-time, Paid Employees*

I begin with my simplest point, but one that many cities have refused to recognize: independent review agencies must be adequately staffed by paid employees rather than volunteers. As Part III discusses above,[216] one significant roadblock to successful independent review is relying on volunteers that have neither the time nor the resources (nor, in many cases, the credibility and authority) to review misconduct complaints in a timely manner, let alone implement lasting reforms.[217] If cities are serious about changing the culture of their police departments, and responding effectively to civilian complaints, they will sufficiently staff and fund independent review agencies.

B. *To Protect Against Bias, Independent Review Agencies Should Be Staffed by a Diverse Array of Civilians and Law Enforcement Officials*

Trusting police officers to police themselves does not work.[218] Any effective review agency must be staffed primarily by independent actors—individuals who are not employed by the police department or connected to it in any way. Using an external oversight model is the first step toward building community trust, by giving civilians a meaningful voice into how the police department operates and what measures can be taken to improve it. It also allows outsiders to identify deficiencies in existing police practices, and promotes transparency in resolving complaints about officer misconduct.[219]

Cities must look beyond the law enforcement community to staff these agencies. Many independent review agencies are staffed primarily or exclusively by former law

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216. *See supra* notes 160-63 and accompanying text.

217. *See* SAFER ET AL., *supra* note 186, at 7, 40; *see also* CLEVELAND INVESTIGATION, *supra* note 48, at 37 (noting that it can take up to two years to complete the review process for an officer found to have committed misconduct).

218. *See supra* Part II.

219. ALBUQUERQUE INVESTIGATION, *supra* note 62, at 37-38.

enforcement officials and prosecutors.[220] A better model is one that incorporates input from members of the public who have no ties to the police department, including those who have been specifically critical of the police. Adding civilian voices to the review process forces authorities to confront the perspectives of the people most affected by police misconduct. It also adds legitimacy to the reform effort—when the public participates, it is more likely to support that effort and invest in its success.[221] This very issue is playing out in Los Angeles, which has a five-member Board of Police Commissioners who serve as an oversight agency for the Los Angeles Police Department.[222] Although the board members are civilians, many view them merely as well-connected political donors, rather than people concerned about or affected by police misconduct.[223] In the fall of 2015, protesters began gathering at and disrupting the weekly Police Commission meetings, demanding that a minority activist be given a spot on the Police Commission.[224] Without any voice on the Commission, many minorities question its impartiality and doubt its commitment to reform.[225]

Precisely how citizens are selected to serve on an independent review agency may vary somewhat from city to city, but two examples that serve as a useful model are Cincinnati's Citizen Complaint Authority and Newark, New Jersey's Civilian Complaint Review Board. The Cincinnati Citizen Complaint Authority was formed in response to a class-action lawsuit by Cincinnati citizens against the City of Cincinnati and the Cincinnati Police Department, alleging widespread misconduct and racially-biased policing.[226] In the

220. *See supra* Part III.B.

221. *See* Simmons, *supra* note 96, at 538-39; Simmons, *supra* note 53, at 409-10.

222. *The Function and Role of the Board of Police Commissioners*, LAPD, http://www.lapdonline.org/police_commission/content_basic_view/900 (last visited May 28, 2016).

223. See Times Editorial Bd., *supra* note 67.

224. *Id.*

225. *See id.*

226. Collaborative Agreement at 2, *In re* Cincinnati Policing, 209 F.R.D. 395 (S.D. Ohio 2002) (No. C-1-99-317).

six years leading up to the lawsuit, Cincinnati police had killed fifteen black men, and the last death—the shooting of Timothy Thomas at the hands of a police officer—ignited four days of rioting.[227]

The parties to the lawsuit eventually reached a settlement known as the Cincinnati Collaborative Agreement.[228] The settlement specified that the city must create the Citizen Complaint Authority, a civilian oversight agency with the mission to "investigate serious interventions by police officers, including but not limited to shots fired, deaths in custody and major uses of force, and to review and resolve all citizen complaints in a fair and efficient manner."[229] Before staffing the Citizen Complaint Authority, the City identified and reached out to eight different "stakeholder" groups: "African-Americans, social service and religious organizations, businesses and philanthropic groups, police line officers and spouses, white citizens, other minorities and youth."[230] The City also made online questionnaires available to all residents, as well as interview opportunities for residents who lacked computer access.[231] The parties to the settlement reported that over 3500 people were consulted during the process of creating the Citizen Complaint Authority.[232]

Ultimately, the City decided to staff the Citizen Complaint Authority with three categories of employees: (1) a board of seven citizens appointed by the mayor and approved by the city council; (2) an Executive Director and support staff, appointed by the City Manager in consultation with the Review Board; and (3) a team of professional

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227. William Freivogel, *Could Police Reform in Cincinnati Provide Model for Ferguson?*, ST. LOUIS PUB. RADIO (Oct. 19, 2014), http://news.stlpublicradio.org/post/could-police-reform-cincinnati-provide-model-ferguson.

228. Collaborative Agreement at 1, *In re* Cincinnati Policing, 209 F.R.D. 395 (S.D. Ohio 2002) (No. C-1-99-317).

229. *Id.* at 18.

230. *Id.* at 2.

231. *Id.*

232. *Id.*

investigators.[233] The settlement agreement required the board to be comprised of a "diverse array of seven individuals, from a cross-section of the Cincinnati community, who have the requisite education and experience to impartially review evidence and render judgments on alleged officer misconduct."[234] It also specified that, to staff the board, the mayor would accept nominations from fifty-two different community councils within the city, as well as businesses, civic and social service agencies, and other organizations.[235] Cincinnati residents who are not nominated through any of these organizations can apply individually.[236] To alleviate the concern that civilians without law enforcement experience might not have the requisite training or knowledge to effectively resolve police misconduct complaints, each member of the board is required, before taking office, to complete a basic training course that includes classes at the Cincinnati Police Academy, instruction in constitutional and criminal protections, and ride-alongs with members of the Cincinnati Police Department.[237]

The Citizen Complaint Authority was formed in 2002 and remains in effect today.[238] As of 2014, its board and staff members included a retired police sergeant who had previously worked with lawyers investigating lawsuits against the Detroit Police Department, a former probation officer, a youth employment coordinator for the Cincinnati Urban League, a customer service professional, and a graphic designer.[239] More than ten years after it was founded, deadly shootings are down and use of force incidents by police officers have dramatically decreased, leading some to suggest

233. *Id.* at 18, 20.

234. *Id.* at 18.

235. *Id.*

236. *Id.*

237. *Id.* at 19.

238. CINCINNATI, OHIO, MUN. CODE art. 27, § 1 (2002).

239. CITY OF CINCINNATI CITIZEN COMPLAINT AUTH., 2014 ANNUAL REPORT 9-10, http://www.cincinnati-oh.gov/ccia/citizen-complaint-authority/citizen-complaint-annual-reports/2014-annual-report.

that the Citizen Complaint Authority has played a significant role in reducing police misconduct[240]

Newark, New Jersey's recently-formed Civilian Complaint Review Board also stresses the importance of diverse civilian viewpoints informing the review of police misconduct claims. The Review Board is composed of nine members, one of whom is selected by the city's inspector general, three of whom are appointed by the municipal council, and five of whom are voted in by specified local and civil rights organizations, including the National Association for the Advancement of Colored People and the ACLU.[241] No more than one member may be a former employee of the Newark Police Department.[242]

The recently-established Ferguson Commission offers another illustration for cities aiming to incorporate civilian viewpoints into their review agencies. Although the Ferguson Commission's responsibilities extend far beyond law enforcement—it is tasked with assessing and addressing a wide array of governmental failures, from school systems to municipal courts—it has a working group specifically devoted to improving law enforcement-citizen relationships.[243] This group tackles topics such as police use of force, anti-bias and cultural competency training, accountability for police misconduct, community policing, civilian oversight of police departments, and special prosecutions for officers accused of criminal misconduct.[244]

To staff the working group, the Commission intentionally recruited "voices and philosophies of practice that were in tension with one another," and selected members in part

240. *See* Freivogel, *supra* note 227.

241. Newark, N.J. Exec. Order (Apr. 30, 2015), http://www.ci.newark.nj.us/wp-content/uploads/2015/02/ExecutiveOrder-CivilianComplaintReview BoardwithRules_FINAL.pdf (establishing the Civilian Complaint Review Board); *see* Daniel Ross, *Newark's New Disciplinary Board Could Flex Rare Muscle over Police*, YES! MAG. (Sept. 11, 2015), http://www.yesmagazine.org/peace-justice/newarks-new-civilian-board-could-wield-rare-disciplinary-muscle-over-police-20150911.

242. Newark, N.J. Exec. Order, *supra* note 241.

243. FERGUSON COMM'N, *supra* note 114, at 13-14.

244. *Id.* at 15.

based on the Commission's commitment to including "diverse voices" in the reform process.[245] The Commission concluded that civilians with no law enforcement experience were crucial to the review process "not because they are experts in policing, but precisely because they are not experts. Their insight into the day-to-day lives of average citizens is the perspective that law enforcement agencies need to effectively protect and serve the community."[246]

Having emphasized the importance of staffing review agencies with a diverse array of civilians representing varied interests and viewpoints, I acknowledge that a limited number of positions in review agencies—specifically, those requiring in-the-field investigative work—may be more fitting for people with law enforcement experience, simply because many people with training and experience as investigators have law enforcement backgrounds. But these investigators need not—and ought not—be part of the police department that the review agency oversees. Some states have incorporated similar principles into law: in Wisconsin, for example, all officer-involved shooting investigations are led by "at least two investigators . . . neither of whom is employed by a law enforcement agency that employs a law enforcement officer involved in" the shooting under investigation.[247] In the case of a review agency, the investigators should be vetted to ensure they have never been employed by, and do not have ties with, the police department they are investigating.

The most effective review agency may also include a designated representative from the police department under review, although that representative should participate only in an advisory capacity and have no role in investigations. I say this for two reasons. First, very few independent review agencies are authorized to require discipline for officers who have committed misconduct, with the usual explanation being that civilians are not sufficiently well-versed in policing procedures to understand when misconduct occurs and what type of discipline is appropriate. Having a

245. *Id.*

246. *Id.* at 30.

247. PRESIDENT'S TASK FORCE ON 21ST CENTURY POLICING, 2015 INTERIM REPORT 21, http://www.cops.usdoj.gov/pdf/taskforce/interim_tf_report.pdf.

representative from the police department participate in an advisory role could inform the disciplinary recommendations, give the review agency more credibility in determining what discipline should be imposed, and lend leverage to the argument that the review agency should have power to require specific discipline. Second, any lasting effort to curb abusive conduct must transform the policing culture that permits—and in many cases fosters—the "us-versus-them" mentality so prevalent among police officers and the communities they are intended to serve.[248] Giving civilians and police officers an opportunity to hear and work with each other could serve as a significant step toward changing that mentality.

Seattle's Citizen Police Commission, formed in 2012, is a rare example of an agency that intentionally incorporates the viewpoints of both law enforcement officials and civilians. The Citizen Police Commission was developed as part of a settlement agreement between the City of Seattle and the DOJ, after the DOJ found a pattern and practice of unconstitutional conduct by Seattle police officers.[249] The Citizen Police Commission consists of fifteen members, appointed by the mayor and confirmed by city council. Two are required to be police officers: one representative from the Seattle Police Officers Guild, and another from the Seattle Police Management Association. The remaining thirteen Commission members are civilians from a wide array of backgrounds.[250] The mayor's office accepts applications online from any interested Seattle resident, and the Commission's stated goal is to "represent[] . . . Seattle's diverse population by selecting equally qualified members from . . . minority, ethnic, and faith communities, student . . . organizations, and any other community organizations."[251]

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248. *See, e.g.*, L. Song Richardson, *Police Racial Violence: Lessons from Social Psychology*, 83 Fordham L. Rev. 2961, 2972 (2015).

249. Settlement Agreement at 4, United States v. City of Seattle, No. 12-CV-1282 (W.D. Wash), http://www.seattle.gov/archive/mcginn/media/pdf/120727settlementagreement.pdf.

250. SEATTLE, WASH., ORDINANCE 124201, at 4 (October 29, 2012), http://www.seattle.gov/Documents/Departments/CommunityPoliceCommission/CPC%20Ordinance%20124021.pdf.

251. *Id.* at 4-5.

In an attempt to ensure the Commission is staffed by a diverse group of civilians, the City developed a list of specific criteria the mayor must consider when selecting commissioners. Seattle's criteria include: demonstrated experience working effectively with diverse populations; demonstrated experience working collaboratively to create positive change in organizations; experience with different aspects of the justice system (whether as prosecutor, defense attorney, defendant, victim, or another unspecified role); experience with race and social justice work, crimes against women, or public and mental health issues; experience with harm reduction models; knowledge of police policies and procedures; understanding of local government and city departments; understanding of labor policy and negotiations; demonstrated community leadership; and independent judgment.[252] People with prior criminal convictions, who have demonstrated successful rehabilitation, are strongly encouraged to apply.[253] In 2015, the commissioners included the acting captain of the Seattle Police Department, a police officer, two reverends, the deputy director of the Washington ACLU, the program coordinator for an organization called Youth Undoing Institutional Racism, a juvenile justice policy advocate, the founder of the Seattle Neighborhood Group, a youth worker, a behavioral health specialist, and a high-ranking public defender.[254] Six are women, and eight are men.[255] Slightly less than one-half of the commissioners are members of a racial or ethnic minority.[256]

In explaining why it chose to create a Commission that incorporates the viewpoints of both law enforcement officials and civilians—including many leaders of organizations traditionally at odds with police departments—the City of Seattle emphasized its belief that reform is "best developed

252. *Id.* at attachment 1.

253. *Id.*

254. Seattle Community Police Commission, *About Us*, http://www.seattle.gov/community-police-commission/about-us (last visited May 28, 2016).

255. *Id.*

256. *Id.*

by dialogue and wide-spread input."[257] Both community members and police officers brought "an important voice to the reform process" that could inform both the development and implementation of new policies and procedures.[258] The Citizen Police Commission has already had some notable successes. Not long after it was founded, the Commission members demanded a voice in developing a new use-of-force policy for the police department and argued that Seattle police officers must be trained in de-escalation techniques, which community groups had long demanded but the police department had never been willing to implement.[259] Although the police department initially pushed back, the end result was a new policy on use of force that included a significant de-escalation component.[260] One of the notable aspects of this triumph was that the Commission, including the Seattle police union representatives as well as traditionally-antagonistic groups such as the ACLU, presented a united front in demanding de-escalation training.[261] Although data on the police department's use of force since de-escalation training began is still very preliminary, a report released by the police department, detailing uses of force between May and August of 2015, showed that officers used force in less than two percent of interactions with people in crisis, which the DOJ hailed as significant progress since the 2012 finding

257. Settlement Agreement, *supra* note 249, at 2-3.

258. *Id.* at 2.

259. Samuel Walker, *How Seattle Bridged the Community-Police Divide*, CRIME REP. (Aug. 27, 2015), http://www.thecrimereport.org/viewpoints/2015-08-how-seattle-bridged-the-community-police-divide.

260. *Id.*; *see* Kathleen O'Toole, *Seattle Police Department Manual: 8.100-De-escalation*, CITY OF SEATTLE (Sept. 1, 2015), http://www.seattle.gov/police-manual/title-8---use-of-force/8100---de-escalation (revised police department policy regarding use of force and de-escalation); Timothy Williams, *Long Taught to Use Force, Police Warily Learn to De-escalate*, N.Y. TIMES (June 27, 2015), http://www.nytimes.com/2015/06/28/us/long-taught-to-use-force-police-warily-learn-to-de-escalate.html?_r=0.

261. Walker, *supra* note 259.

that the police department had a pattern and practice of using excessive force.[262]

My last suggestion for staffing an independent review agency is that, in addition to full-time, paid staff, cities should allow young adults—high school or college students—to apply for volunteer positions on the board. Young adults are one of the demographics most likely to suffer the effects of police misconduct, and in many cases are also the most likely to have a poor opinion of the police. Their voices should be heard in the reform process. A recent report suggesting reforms for the St. Louis County, Missouri Police Department made a similar proposal, recommending that the police department "create a board of young adult police commissioners made up of juniors and seniors from several city high schools," whose mission would be to "bridge the gap between young adults and [St. Louis County] officers."[263] Rather than creating a separate board of young adults, teenagers and young adults should be allowed to apply for volunteer positions in the review agency, adding their voice and lending fresh perspective to the problems that can arise from police misconduct.

C. *Independent Review Agencies Should Be Responsible for Intake of All Civilian Complaints*

Meaningful accountability for police misconduct begins at the intake stage of a complaint. When civilians who have been victims of police misconduct try to file complaints, requiring them to report the misconduct to other officers in the same police department often has, as explained in Part II, the effect of deterring civilians from filing the complaint at all. If an individual is afraid to make a complaint or otherwise deterred from doing so, the misconduct will never be reported, let alone investigated or resolved. And if the officer receiving the complaint does not thoroughly document

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262. Brandi Kruse, *Report: Seattle Police Officers Rarely Use Force Against People in Crisis*, Q13FOX. COM (Sept. 7, 2015, 5:33 PM), http://q13fox.com/2015/09/07/report-seattle-police-officers-rarely-use-force-against-people-in-crisis.

263. NORTON ET AL., *supra* note 195, at 11.

and report it to the investigating body, any hope of a fair and complete investigation is compromised from the outset.[264]

A simple solution to these concerns is authorizing independent review agencies to handle the initial intake for all civilian complaints. These agencies should make the complaint-reporting process as easy as possible for civilians, and allow people to report complaints in person or by mail, email, telephone, fax, or via a complaint form on the agency's website.[265] In case civilians do not know to file their complaints with the independent review agency, police departments themselves should be required to post information in every police station, detention center, and courthouse about how to file a complaint, and to provide the appropriate information when asked by a civilian. Cities should also require police officers by law to notify the independent review agency of any civilian complaint that is made to an officer.[266] While it may take some time and effort to educate the public about the options available to them for filing complaints, the end goal is a robust and recognized review agency that civilians immediately seek out when misconduct occurs.

D. *Independent Review Agencies Should Be Responsible for Tracking Early Warning Signs of Misconduct, and Reporting It to the Public*

In many police departments, a small minority of officers account for a disproportionate percentage of misconduct.[267] Early intervention systems, which typically take the form of software allowing authorized users to track the number and type of complaints incurred by a particular officer, can identify these officers early in their career and allow police

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264. *See* NEW ORLEANS INVESTIGATION, *supra* note 48, at 86.

265. Simmons, *supra* note 96, at 515.

266. I recommend imposing a reporting requirement by law because the alternative—trusting police departments to informally cooperate with review agencies in reporting complaints—has proven unsuccessful. *See, e.g.*, *supra* notes 86-89 and 183-84 and accompanying text (discussing reporting failures by Denver Sheriff's Department and Seattle Police Department).

267. SEATTLE INVESTIGATION, *supra* note 121, at 4.

departments—and review agencies—to pay closer attention to these officers.[268] Early intervention software can also track a variety of other officer activities, including documented uses of force, stops, and arrests.[269]

Although some police departments have early intervention systems in place, they have been decidedly lax in utilizing those systems. Albuquerque, for example, has an early intervention system, but it is effectively useless. The system tracks only limited types of misconduct, and has absurdly high thresholds for the number of warnings an officer can incur before triggering serious intervention.[270] When Albuquerque police officer Sean Wallace shot and killed an unarmed man in 2011, the public learned only after the fact that this was Wallace's third shooting of an unarmed civilian. Wallace had killed his first victim in 2004, and wounded another in 2010, but received no discipline for either of these prior incidents.[271]

If an independent review agency is responsible for intake of all civilian complaints, then the agency is also in the best position to track officers with repeat complaints. Using an early intervention system to track these officers would allow a review agency to recommend (or require) additional training for officers who are the subject of complaints, or identify them within the department to discourage the identified officers (as well as their colleagues) from future misconduct.[272] It would also help the review agency identify which officers deserve serious discipline or termination for their misconduct: an officer who has had multiple complaints and continued his behavior should be removed from the force,

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268. NEWARK INVESTIGATION, *supra* note 49, at 43.

269. CLEVELAND INVESTIGATION, *supra* note 48, at 47; *see also* U.S. DEP'T OF JUSTICE, PROMOTING COOPERATIVE STRATEGIES TO REDUCE RACIAL PROFILING 7-8 (2008), http://ric-zai-inc.com/Publications/cops-p146-pub.pdf (discussing the procedures and potential benefits of early intervention for new police officers).

270. ALBUQUERQUE INVESTIGATION, *supra* note 62, at 29.

271. *Id.* at 12; Astrid Galvan, *Shooting Was Police Officer's Third*, ALBUQUERQUE J. (May 12, 2011), http://www.abqjournal.com/news/metro/122256556202newsmetro05-12-11.htm.

272. *See* Simmons, *supra* note 53, at 396-97.

whereas an officer's first complaint may, depending on the type of misconduct, deserve less serious discipline.

In addition to tracking the number of complaints filed against each individual officer, review agencies should also report this information to the public (even if they are prohibited by law from identifying the officer by name). The Chicago Council of Lawyers, a bar association devoted to public interest law, has already called on Chicago's Independent Police Review Authority to make available information that would allow the public to identify how many complaints each individual officer has received.[273] The Review Authority's current practice is to issue quarterly reports listing the number of complaints each officer in a given district received during that quarter, without identifying the officers by name. The Review Authority does not, however, provide any means of tracking whether that same officer continued to receive complaints after the three-month period had passed, nor does it indicate whether those complaints were sustained.[274] I recommend requiring review agencies to issue annual reports indicating the number of complaints individual officers receive each year, what types of complaints each officer received, and a short summary of the factual allegations, as well as how many complaints against each officer were sustained, and a more detailed description of the sustained complaints. This would alert the public to repeat-offender officers and hold the police department accountable for keeping those officers on the force.

The White House has also recognized the importance of tracking civilian complaints and invested money and effort into reforming early warning systems by making the information obtained more accessible to the public. The White House-sponsored Police Data Initiative, which began in 2015, recruits police departments that agree to submit their data archives on police-citizen encounters to outside researchers for analysis and suggestions on how the data can

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273. CHICAGO COUNCIL OF LAWYERS, CHICAGO NEEDS TO REPORT MORE COMPREHENSIVE DATA ABOUT HOW IT PROCESSES MISCONDUCT COMPLAINTS AGAINST POLICE OFFICERS 4-5. (2015), http://files.ctctcdn.com/48087546001/8e90e9e6-e26c-42fd-adb0-768de52ce936.pdf.

274. *Id.* at 4.

be used to reform police departments and eliminate officers who engage in repeated misconduct.[275] Although the initiative is in its early stages, it may hold promise for independent review agencies as well.

E. *Independent Review Agencies Should Have Authority to Investigate All, Rather than a Limited Subset of, Civilian Complaints*

Some independent review agencies are hampered in their efforts to reform police departments because they are authorized to review only certain types of misconduct. New York's Civilian Complaint Review Board, for example, cannot review any complaints regarding false statements or perjury by police officers, even though the police department has a significant problem with officers making false statements, and the department's Internal Affairs Unit has not solved the issue.[276] Chicago's Independent Police Review Authority investigates misconduct complaints alleging improper use of force, bias-based policing, domestic violence, and officer-involved shootings, but leaves the remainder of complaints to the police department's Bureau of Internal Affairs.[277] Even Cincinnati's Citizen Complaint Authority, earlier cited as a model for agencies seeking to incorporate a wide array of citizens in the review process, is authorized to investigate only "serious interventions by police officers, including but not limited to shots fired, deaths in custody and major uses of force."[278]

Restricting review agencies in this way hinders their efforts to achieve meaningful reform. While officer-involved shootings are tragically prevalent and certainly deserve independent investigation, many civilian complaints involve

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275. *See* Andrew Tarantola, *White House Launches Police Data Initiative*, ENGADGET (May 18, 2015), http://www.engadget.com/2015/05/18/white-house-launches-the-police-data-initiative; *see also* Megan Smith & Roy Austin, *Launching the Police Data Initiative*, WHITEHOUSE.GOV (May 18, 2015), https://www.whitehouse.gov/blog/2015/05/18/launching-police-data-initiative.

276. *See* N.Y.C. CIVILIAN COMPLAINT REVIEW BD., *supra* note 188, at x-xi, 39-45.

277. SAFER ET AL., *supra* note 186, at 57; *see also* CHI., ILL., MUN. CODE ch. 2-57 (2007) (establishing IPRA).

278. CINCINNATI, OHIO, MUN. CODE art. 27, § 1 (2002).

more mundane issues like discourtesy and verbal abuse or threats, which may not rise to the level of "major uses of force," but nonetheless seriously impede the police department's relationship with the community. Where police departments have proven consistently ineffective in addressing even these lesser forms of misconduct, independent review agencies should be authorized to review all complaints instead of a limited subset.

F. *Independent Review Agencies Must Have Sufficient Investigative Power to Effectively Review Complaints*

For some agencies, the obstacle lies not in what complaints they are authorized to review, but whether they can effectively review those complaints. Many independent review agencies lack subpoena power, and instead must base their investigations and conclusions almost entirely on whatever information the police department chooses to give them. Review agencies should have subpoena power. They should also have a presumption of access to all police files; cities should require police departments to disclose all requested files, with the only possible exception being *in camera* review by a court if the police department objects.[279]

Cities should also require police officers to cooperate with independent review investigations. The Cincinnati Collaborative Agreement is an example of this. The Agreement provides that, as a condition of employment, all police officers and city employees are required to provide truthful and accurate information to the Citizen Complaint Authority when asked.[280] In cases where an officer might be

279. As I mention in Part III.C, *supra*, many review agencies as they are currently structured have to contend with state or city laws prohibiting public access to police records. Although a strong case could be made that these laws should be amended or simply eliminated, that is an article for another day. For now, I note simply that lawmakers creating the review agencies should explicitly authorize these agencies to access police files, and exempt agencies from the prohibitions on access that apply to most members of the public.

280. Collaborative Agreement at 21, *In re* Cincinnati Policing, 209 F.R.D. 395 (S.D. Ohio 2002) (No. C-1-99-317); *see also* United States v. City of Ferguson, No. 4:16-cv-000180-CDP (E.D. Mo. Mar. 17, 2016), at 89 (creating a duty of candor in Ferguson police officers to provide truthful answers in "all matters and official

subject to criminal penalties, the review agency may choose not to compel an officer's testimony, because that testimony could subsequently be immunized from use in criminal prosecution.[281] But criminal prosecutions are a rare subset of misconduct cases, and the agency should at least have the option of requiring accused officers to cooperate in the investigation. Enforcing such requirements could go a long way toward solving the problem of review agencies hamstrung by resistance from police departments.

Independent review agencies should also participate in the immediate response to high-profile investigations, as soon as an incident involving potentially serious police misconduct occurs. Denver's Office of the Independent Monitor, for example, is authorized to come to the scene of an officer-involved shooting, before any complaints are even reported, and assist in determining whether a crime occurred.[282] Denver's civilian monitors also observe all video interviews of witnesses to the shooting, and can provide additional questions for the officers to ask during the interview.[283] In this way, the monitors provide civilian oversight as soon as the investigation starts, and reduce the all-too-common scenario in which the inquiry into a controversial incident like an officer-involved shooting is corrupted from the outset by departmental bias.[284]

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investigations relating to the scope of their employment," under penalty of termination).

281. *See* Garrity v. New Jersey, 385 U.S. 493 (1967) (providing that compelled testimony for use in administrative proceedings may be immunized from use in criminal prosecutions). For a discussion of the problems associated with *Garrity* immunity, see generally Steven D. Clymer, *Compelled Statements from Police Officers and* Garrity *Immunity*, 76 N.Y.U. L. Rev. 1309 (2001).

282. DENVER OFFICE OF THE INDEP. MONITOR, *supra* note 87, at 47.

283. *Id.*

284. Ideally, independent review agencies should be solely responsible for investigation of officer-involved shootings with no police involvement at all, but at a minimum any police investigation should be done by an outside police department. Currently only two states, Wisconsin and Connecticut, require investigations of officer-involved shootings to be handled by police departments other than the one from which the shooting officer hails. *See* CONN. GEN. STAT. § 51-277a (2015); WIS. STAT. §175.47 (2014); Holly Yan & Ashley Fantz, *Police Kill*

G. *Independent Review Agencies Should Avoid Stringent Requirements Regarding Who Can File Complaints and When*

As discussed in Part III, many independent review agencies are bound by statutes or regulations that govern, and in many cases restrict, the way they conduct their investigations. For example, some agencies are allowed to pursue investigations only if the complainant will sign a sworn affidavit; in the absence of such an affidavit the agency cannot continue the investigation, and the complaint is automatically dismissed.[285] Others will not proceed without a signed complaint, and still others have ninety-day reporting deadlines; a complaint made more than ninety days after the alleged incident will not be accepted or investigated.[286] Many of these rules have the (intended or unintended) effect of drastically reducing the number of complaints that can be sustained against police officers.

Cities should authorize review agencies to proceed with investigations in the absence of an affidavit or signed complaint, or even the name of the complainant. Particularly in cases involving threats or abuse by police officers, it is easy to understand why some complainants are not comfortable providing their full names and a sworn complaint. A recent report on the St. Louis County Police Department warned that the department may be limiting civilian complaints even by putting a signature line on the complaint form—suggesting that the complaint must be signed before filing—and also by failing to inform the public that anonymous complaints are permitted.[287] The report recommended that the signature line be removed and that all printed material,

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Teen: Why Wisconsin's Investigation Will Be Different, CNN (Mar. 10, 2015), http://www.cnn.com/2015/03/10/us/wisconsin-police-shooting-rules.

285. *See supra* note 186 and accompanying text.

286. ALBUQUERQUE INVESTIGATION, *supra* note 62, at 38-39, 43.

287. NORTON ET AL., *supra* note 195, at 8-9, 102.

as well as the department's website, make clear that anonymous complaints will be accepted.[288]

Cities should also eliminate strict deadlines for filing of complaints. In Cincinnati, the Citizen Complaint Authority is authorized to review complaints submitted within one year of the date of an incident; even complaints submitted after that one-year period may still be reviewed in the discretion of the Executive Director.[289] Although a relatively small number of complaints may be filed more than ninety days after the complained-of conduct, one can easily imagine good reasons for letting those complaints be reviewed: for example, if the complainant was arrested during the complained-of incident, and had no opportunity to report the misconduct until after he was released.

H. *Independent Review Agencies Should Have Authority to Impose Discipline, Rather than Make Recommendations the Police Department Is Free To Reject*

Authorizing independent review agencies to impose discipline would be a significant step toward enforcing the kinds of reform that police departments themselves are so reluctant to adopt. In early 2015, the mayor of Newark, New Jersey, Ras Baraka, formed a Civilian Complaint Review Board believed to be the first independent review agency authorized to impose discipline that the police department cannot, except in rare circumstances, refuse.[290] When Newark's Civilian Complaint Review Board substantiates a complaint against an officer and proposes discipline, the police department must impose that discipline unless the police chief appears in person and convinces the Board that its decision was erroneous.[291]

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288. Police officers themselves, of course, rely heavily on anonymous complaints in investigating criminal activity. *E.g.*, Alabama v. White, 496 U.S. 325, 326-28 (1990).

289. CITY OF CINCINNATI CITIZEN COMPLAINT AUTH., *supra* note 239, at 11.

290. Ross, *supra* note 241.

291. *See id.*; *see also* Newark, N.J. Exec. Order, *supra* note 241.

Although Newark's model is untested, it holds great promise. Currently, most independent review agencies recommend only minor discipline for major problems, likely because they know the police department is less likely to follow their recommendations if the discipline is severe.[292] To create true reform, serious misconduct must be met with appropriate discipline. Untruthfulness, for example, is an enormous problem in police departments across the country: police officers have a deserved reputation for covering up for their colleagues at almost any cost, even when major misconduct has occurred. A recent report assessing Chicago's Independent Police Review Authority suggested that, when the agency finds that a police officer "deliberately concealed or failed to disclose information" about a fellow officer's misconduct, the agency should automatically recommend dismissal from the force.[293] The DOJ came to the same conclusion in Ferguson, recommending that officers found to have been untruthful in the performance of their duties, including responding to misconduct investigations, be terminated.[294] The same harsh discipline is needed for proven incidents of racial bias or discrimination. There is no excuse for racially-biased or discriminatory policing, and its prevalence on police forces is a testament only to how unacceptably long police departments have tolerated such pernicious prejudice.

Resistance by police departments and unions to civilian oversight can be expected, particularly when the civilian review agency is authorized to actually impose discipline, rather than merely make recommendations. In Newark, after the city council approved creation of the Civilian Complaint Review Board, the police union immediately responded by saying that it intended to file a lawsuit challenging the authority of the Board.[295] But Newark is combating this resistance by emphasizing the widespread

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292. *See supra* pp. 880-81 (detailing the minor discipline recommended by Chicago's Independent Police Review Authority, and the numerous options police officials and the officers under review have for disregarding or appealing those recommendations).

293. SAFER ET AL., *supra* note 186, at 4-5, 23.

294. FERGUSON INVESTIGATION, *supra* note 33, at 96.

295. Porter, *supra* note 181.

support that the Civilian Complaint Review Board enjoys at both the national and local level. Before the city council voted on the Civilian Complaint Review Board, twenty-six national and local civilian organizations, including Black Lives Matter, the Boys and Girls Club of Newark, the New Jersey Working Families Alliance, numerous Latino organizations, and even the National Organization of Black Law Enforcement Executives, signed a letter in support of the Board.[296] Mayor Baraka and Newark's Public Safety Director also read statements in support of the Board.[297] The city council approved the Review Board in a unanimous vote, and after the police union threatened a lawsuit, Mayor Baraka encouraged the police to "embrace the opportunity the board would offer to increase transparency and accountability."[298] The union has not yet followed through on its threat to sue.

Relatedly, when review agencies find that an officer's misconduct rose to the level of a crime, they should be allowed to require that a special prosecutor, who does not have a working relationship with the police department or officer under investigation, be appointed to determine whether criminal charges are appropriate. Prosecutions of police officers are extremely rare. Over a five-year period from 2010 to 2014 the Albuquerque Police Department managed to kill twenty-eight people (a per-capita kill rate eight times that of the New York Police Department), and until 2014 not one of the officers involved in those twenty-eight killings had been charged with any crime.[299] The District Attorney's office in New Orleans also routinely refuses to prosecute police officers who commit crimes. In one particularly disturbing example, the office twice declined to

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296. *Newark Makes History with Council's Passage of Permanent Police Oversight Board*, ACLU N.J. (Mar. 16, 2016), https://www.aclu-nj.org/news/2016/03/16/newark-makes-history-councils-passage-permanent-police-overs.

297. *Id.*

298. Porter, *supra* note 181.

299. Nick Pinto, *When Cops Break Bad: Inside a Police Force Gone Wild*, ROLLING STONE (Jan. 29, 2015), http://www.rollingstone.com/culture/features/when-cops-break-bad-albuquerque-police-force-gone-wild-20150129?page=2.

prosecute a New Orleans police officer accused of indecent behavior with a juvenile and rape; the officer remained on the police force until he was accused in a third case of forcibly raping and molesting a juvenile, and finally charged.[300] In Cincinnati, the 2015 murder indictment of University of Cincinnati officer Ray Tensing, for the shooting death of Samuel DuBose, was the first time any officer in the county had ever been charged with murder for killing a civilian while on duty.[301] Given prosecutors' cowardly track records when it comes to filing charges against police officers, and the close relationship they often have with the officers they are called upon to prosecute, review agencies should have authority to appoint a special prosecutor when they find that officers have committed criminal misconduct.

The Ferguson Commission report made this point, recommending that independent review agencies be "[a]ble and authorized to investigate potential criminal wrongdoing by officers and to make recommendations for prosecutions that are then evaluated by special prosecutors."[302] These kinds of reforms could be a significant step toward eliminating the lethargy and institutional bias that has allowed misconduct to proliferate, but they will not be possible if the findings of the review agency are only suggestions. Agencies must be given power to enforce their findings.

CONCLUSION

After Samuel DuBose—an unarmed black man pulled over for a minor traffic violation—was shot and killed by Cincinnati police officer Ray Tensing in July of 2015, Hamilton County Prosecutor Joe Deters almost immediately

300. NEW ORLEANS INVESTIGATION, *supra* note 48, at 94.

301. Richard Pérez-Peña, *University of Cincinnati Officer Indicted in Shooting Death of Samuel Dubose*, N.Y. TIMES (July 29, 2015), http://www.nytimes.com/2015/07/30/us/university-of-cincinnati-officer-indicted-in-shooting-death-of-motorist.html?_r=0.

302. FERGUSON COMM'N, *supra* note 114, at 28.

vowed to charge Tensing with murder.[303] Deters's blunt determination took some by surprise. In his press conference announcing his decision to file murder charges, he told the gathered crowd, "look . . . we're gonna follow the law in this office and we are going, if the facts fit the law, we're gonna pursue that no matter if you're a police officer or you're Pope Francis, I don't care who you are, we're gonna go after you."[304]

Officer Tensing's criminal case has not yet been resolved, and it remains to be seen whether he will be convicted for DuBose's murder. But the promise Deters's statement embodies—that police officers who mistreat civilians will not get away with it simply because of their status or office—is a sadly elusive one for many people, particularly the minorities who are so disproportionately victims of police misconduct. Our nation's police departments desperately need to be reformed. That reform must take place on many levels, but one piece of it is ending—at long last—the practice of trusting police departments to police themselves.

303. WCPO, *Ray Tensing, Samuel DuBose: Hamilton County Prosecutor Joe Deters Discusses Murder Indictment*, YOUTUBE (July 29, 2015), https://www.youtube.com/watch?v=TrSfVk-tqug.

304. *Id.*